A Public Safety Law Firm

RDL

REIMER DOBROVOLNY & LABARDI PC

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Legal and Legislative Update

Police Consolidation Board Announces Asset Transfer Dates

On December 20, 2021, the Police Officers' Pension Investment Fund (POPIF) advised all Article 3 funds of their asset transfer date. Assets will be transferred in three stages on either March 1, April 1, or May 2, 2022. Individual boards should refer to the correspondence received from POPIF for the specific date on which its funds will be transferred.

Included with the notice from POPIF was an instruction letter, draft resolution appointing authorized agents, and draft notice to custodians for consideration and execution by the local Article 3 funds. **Execution of the Resolution attached to the POPIF correspondence as Exhibit A requires pension board action and should be added to the agenda for review, consideration, and potential approval at your Fund's first quarter meeting.** As noted in the instruction letter received from POPIF, once executed a copy of the resolution should be sent to POPIF and notice of the same sent to the local fund's custodian and

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investment professionals. We recommend Authorized Agents appointed by Article 3 Funds be a pension board trustee and preferably a signer on the fund's custody accounts.

Of course, one of the issues to be addressed with the impending transfer of assets is how local funds will continue to pay benefits and other expenses. Local police pension funds should formulate, adopt, and implement a written cash management policy prior to their funds transfer date. While the POPIF has not yet provided guidelines for a cash management policy, as was the case with the firefighters' transfer, it is anticipated local police pension funds will need to hold at least three months benefits and expenses in a local account. How cash is drawn after this initial period has yet to be determined. Local funds should consult with their accountants, treasurer, and payroll administrator to create and adopt a policy best suited to their needs. Once these details are worked out, your RDL attorney will be happy to assist in making recommended changes to any template cash management policy.

This policy should be adopted and implemented prior to the receipt of a certified asset list which should occur no later than 10 business days prior to your fund's transfer date although it may occur earlier. "Discussion/adoption of Cash Management Policy" should also be added to your first quarter meeting agendas.

The announcement of transfer dates is the first step in what will be many in the near future implementing the consolidation of all Article 3 pension fund assets. Developments are expected to continue to occur quickly in this area in the near future. We will continue to keep funds up to date on any new developments. In the meantime, please do not hesitate to contact your RDL attorney should you have additional questions. ❖

Police Officers' Pension Investment Fund Update

Since our last newsletter, significant developments have occurred at the Illinois Police Officers' Pension Investment Fund (IPOPIF). The IPOPIF has now adopted a number of new administrative rules pertaining to asset transfer and approved an Investment Policy Statement. All of these documents may be found on the IPOPIF website. IPOPIF also hired Foster & Foster to provide actuary services.

Most significantly, IPOPIF has announced three tranches to begin transfer of assets from Article 3 funds. Depending on your Fund, assets will transfer on March 1, April 1, or May 2, 2022. Correspondence from IPOPIF was sent to all Article 3 funds on December 20, 2021 announcing your Fund's transfer date and providing additional instructions and actions to be taken in anticipation of that event. Please see the article included elsewhere in this newsletter for additional details on asset transfer.

Any additional updates may be found on the Fund's website at https://www.ipopif.org/ One final reminder; please recall Reimer Dobrovolny & LaBardi PC serve as general counsel for the IPOPIF. ❖

Fire Consolidation Board Updates

By the time you read this newsletter, most Article 4 fund assets in the State will have been transferred to the Firefighters' Pension Investment Fund (FPIF). You may recall the initial schedule for transfer of assets was October 1, 2021, November 1, 2021, December 1, 2021, or January 4, 2022. Funds that did not timely complete the required paperwork were moved to either a February or

April 2022 transfer date. Correspondence to these funds from FPIF also informed them they are considered in violation of the Pension Code and reported the same to the Department of Insurance. The FPIF also recently adopted actuary assumptions which will be used in it's computation for actuary reports for all Article 4 funds. Among other assumptions, FPIF elected to use an actuarial rate of return of 7.125%. This is significantly higher than the rate of return assumptions presently used by most Article 4 funds or the Department of Insurance which employs a 6.5% as the maximum rate of return assumption for the largest and most well-funded Article 3 and 4 funds. For most Article 4 funds, this will likely decrease the employer contribution.

Article 4 funds that transferred October 1 have also received their first account statement from FPIF which curiously have no accounting of fees or expenses. Presumably these will be reflected on future statements received by funds.

As a reminder to funds that have not yet transferred or those funds who have not completed all the steps needed to begin management of benefits at the local level without ready access to assets, by this time all funds should have approved and executed the draft resolution appointing authorized agents. During this process and as a guidepost to future transfer date funds, it was determined individuals appointed as authorized agents should also be signers on the fund's custody account. Following these preliminary documents, funds were asked to execute a letter of direction (LOD) giving authority to share information with FPIF and, ultimately, transfer their assets upon receipt of the transferable asset list. An important change to these LODs was made by RDL attorneys splitting the single LOD into two separate LODs. The first LOD authorized information sharing while the second LOD authorized transfer of the assets after receipt and review of the transferable asset list by the fund. Without this change, the funds were being asked to approve transfer of assets appearing on a list that had yet to be generated or reviewed by the local fund. This has already proven valuable as some funds have identified errors in the transferable asset list received from FPIF.

Most funds should also have been sent paperwork to open the electronic portal between the local fund and Northern Trust as custodian for FPIF. This will allow money to flow both to and from FPIF.

Finally, at this point all Article 4 funds should have adopted or at least discussed how they will continue to pay benefits and other expenses post-consolidation. **"Discussion/adoption of Cash Management Policy"** should be added to agendas for funds that have not yet addressed this issue inasmuch as **this policy must be adopted prior to receipt of the certified asset list which will occur approximately two weeks prior to your fund's transfer date**. Local firefighter pension funds should formulate, adopt, and implement a written cash management policy prior to their funds transfer date. While the FPIF has provided guidelines for a cash management policy on it's website (https://ifpif.org/policies-publications/), each fund's needs are unique. The FPIF guidelines suggest keeping at least three months benefits and expenses in a local account. It should also be noted, local funds will not be able to call on assets transferred to FPIF for 60 days following the initial transfer of assets. According to the policy adopted by FPIF, following this initial period, local funds may request cash on a monthly basis. Local funds should consult with their accountants, treasurer, and payroll administrator to create and adopt a policy best suited to their needs. Once these details are worked out, your RDL attorney will be happy to assist in making recommended changes to any template cash management policy.

As we go deeper into this never before attempted process, please do not hesitate to contact your RDL attorney with any questions. ❖

Consolidation Lawsuit Update

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

As reported in prior RDL newsletters, on February 23, 2021, a lawsuit was filed in Kane County challenging the Pension Consolidation Act. Since our last newsletter, on November 10, 2021 the Court heard argument on cross-motions for summary judgment and class certification. Following a lengthy oral argument, the Court took the matter under advisement. At the time of this writing, no ruling has been issued. A ruling on the cross motions for summary judgment would likely finally resolve this matter at the Circuit Court level. In the event the Circuit Court found any portion of the Act unconstitutional, a direct appeal may be filed with the Illinois Supreme Court. In the event the Court finds the Act constitutional, any appeal would follow the usual procedure and be filed in the Second District Appellate Court in Elgin.

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

Pension Boards Still Have Remote Meeting Option

As we have all become aware over the course of the pandemic, permanent amendments to the Open Meetings Act have been enacted in response to the necessity to hold public meetings during the ongoing Coronavirus pandemic.

On December 10, 2021, Governor Pritzker signed the most recent Gubernatorial Disaster Proclamation which remains in effect through January 9, 2022. Given the recent increase in cases, it is anticipated this most recent order will be renewed upon expiration. Those who have been following this issue will note the Governor has been issuing 30-day disaster proclamations in succession since March 2020. While recent proclamations have eliminated the finding attendance at the regular meeting location is "not feasible", this finding may still be made by pension board presidents. As a reminder, the "feasibility" portion of the OMA in this context pertains to how the public attends/participates. If a pension board continues to find in-person attendance at the regular meeting location "not feasible", that finding should be included on the agenda and the public should be given the opportunity to attend and comment via whatever remote means the public body employs.

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

1) The Governor or Illinois Department of Public health has issued a disaster declaration covering all or part of the jurisdiction of the public body.

2) The head of the public body determines an in-person meeting is not practical or prudent because of a disaster.

3) All members of the public body participating in the meeting must verify they can hear one another and all discussion or testimony.

4) Members of the public present at the regular meeting location can hear all discussion or testimony and all votes taken unless attendance at the regular meeting location is not feasible due to the disaster. If in-person attendance by the public is not feasible, the public body must provide alternative means for the public to hear the meetings such as using a telephone or web-based link.

5) At least one member of the public body, chief legal counsel, or chief administrative officer is physically present at the regular meeting location, unless not feasible because of the disaster.

6) All votes must be conducted by roll call of each member.

7) Notice must continue to be posted at least 48 hours' in advance of the meeting.

8) The public body must keep a verbatim record in the form of an audio or video recording of meetings held in this manner.

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Court Implores Legislature to Re-write Indecipherable Portions of the Pension Code

Robbins v. The County Employees' & Officers' Annuity & Benefit Fd. of Cook Co., et al., 2021 IL App (1st) 192142

The Court considered whether a recent retiree qualified for a cost of living increase (COLA) under Article 9 of the Pension Code. Initially, the Court made some interesting comments about the confusing nature of the Pension Code and the lack of clarity in the legislature's drafting. Noting that even judges and lawyers have great difficulty understanding and interpreting many provisions of the Code, the opinion's first few paragraphs constitute a public service announcement for the legislature to redraft portions of the Pension Code. As for the merits, the Court's opinion provides an analysis of when a recent retiree receives a COLA. The retiree filed for and formally retired before reaching at age 59, but then turned 60 before receiving her annuity benefit. Prior to her retirement, she was advised by a co-worker that she would receive the COLA adjustment on January 1st of the next year if she retired at age 59. However, both the fund and the board found otherwise.

The Appellate Court agreed with the fund and the board. In doing so, the Court interpreted and cross-referenced sections 9-134, 9-127, and 9-133 of the Pension Code, concluding that a retiree is not "on annuity" until she was actually receiving her annuity benefit. Since the retiree was 60 when she started receiving her benefit, despite officially retiring at age 59, she was "on annuity" at that time and did not qualify for a COLA on the subsequent January 1st. Essentially, a retiree would have to retire and receive her benefit before age 60 in order to receive the adjustment the following year.

While this case involves an interpretation of Article 9 of the Pension Code, it does serve as a good reminder the legislative wordsmiths tasked with drafting the Pension Code did not always make clear the benefit structure for members. Even the Appellate Court sometimes has difficulty interpreting and applying what the Legislature has wrought. Counsel experienced in pension matters is vital to addressing the complicated issues arising under the Pension Code. ❖

QILDRO Calculation Only Includes Periods of Creditable Service

In re Marriage of Wehr, 2021 IL App (2d) 200726

In the setting of a divorce case, a Qualified Illinois Domestic Relations Order (QILDRO) is a court order needed to divide a pension benefit between the divorcing parties. QILDRO's are a creation of the Pension Code and provide a form for both the QILDRO and QILDRO calculation order. (See 40 ILCS 5/1-119). In the case where a percentage of a retirement benefit is awarded to the non-member (alternate payee), a calculation order is needed to set the dollar amount payable to the alternate payee.

One of the parties to the divorce in this case was a participant in IMRF. The parties entered a Marital Settlement Agreement (MSA) dissolving their marriage and, among other things, ordered a QILDRO be entered dividing the IMRF pension. The MSA contemplated a QILDRO dividing the benefit using a formula considering the number of months married *while a plan participant*. Implementing the terms of the MSA, the parties entered a form QILDRO provided by IMRF.

Using the form QILDRO and calculation order, the ex-spouse entered orders indicating she was due $821.31 per month. After consideration of the formula, the member contented he should only be paying $459.31 per month. The issue and difference in calculations stemmed from the phrase "while a plan participant".

In this case, the former IMRF member had two periods of service during the marriage. First from March 1982 – May 2007 and then again from May 2015-April 2019. While his total IMRF service was 29 years 6 months, because of the break in IMRF service not all of this time was accrued during the marriage. The member contended the ex-spouse was only eligible for benefit based on service accrued during the marriage while the ex-spouse argued the member continued to be a "plan participant" during the entire duration of the marriage regardless of whether he was actively participating in IMRF. The Circuit Court agreed with the ex-spouse and awarded the higher benefit to her based on the entire amount of IMRF service.

The Appellate Court disagreed and ordered the QILDRO be based only on the amount of service in IMRF accrued during the marriage. While the member had 29 years 6 months of total IMRF service credit, only 10 years 8 months occurred the marriage. Interpreting what it meant to be a "plan participant", the Appellate Court found he member was not a "plan participant" when not accruing benefits. The time during which he had no service, made no contributions, nor accrued additional service credits did not constitute time during which he was a plan participant. As such, the QILDRO calculation based on 10 years 8 months resulting in a payment to the alternate payee of $459.31 per months was correct and the Circuit Court erred in using the dictionary definition of "participant" resulting in the higher award.

While any QILDRO or calculation order should be provided to your pension attorney for review and approval prior to implementation by your Fund, by statute the calculations are the responsibilities of the parties. The Fund must accept them even if incorrect. As such, diligence by the parties to the divorce case here corrected the error by the Circuit Court in awarding a higher benefit to the alternate payee. ❖

Pension Board Finding of No Disability is Against the Manifest Weight of the Evidence

Girot v. Bd. of Trustees of the Braidwood Police Pension Fd., 2021 IL App (3d) 200008-U

Prior to being hired as the Braidwood Police Chief, Girot had been a Will County Deputy for 22 years. As a Will county Deputy, Girot sustained a number of injuries, one of which involved a finding from the worker's compensation commission he had a permanent disability to his left leg. He started a four year term as chief in Braidwood in April of 2011.

Three relevant incidents occurred shortly thereafter. In July of 2011, Girot tripped on the concrete outside the station injuring himself. In January of 2012, Girot received a total left knee replacement to alleviate symptoms from knee injuries suffered prior to becoming chief. This surgery led to him develop another condition known as complex regional pain syndrome (CRPS). In October of 2012, he again tripped on the concreate outside the station injuring himself.

Girot filed an application for line-of-duty disability benefits in April of 2015, seven days before his last day of duty. He cited the trip and fall incidents outside the PD indicating they occurred while he was performing his duties as police chief thus entitling him to a line-of-duty pension. At hearing the application was amended to include a request for a not-on-duty pension in the alternative.

Medical opinions found Girot was disabled due to his CRPS and the opioid medications he was required to take for associated pain. Medical opinions did not find a link between the two trip and fall incidents and Girot's disability.

Following a hearing, the Board denied all claims for disability benefits, finding the chief was no less disabled when he left Braidwood than when he started. The Board found no link between the trip and fall incidents and disability as any disability was due to his CRPS and corresponding treatment. Furthermore, at the time of the trip and fall incidents, the chief was not acting in any capacity that would constitute an "act of duty". Finally, the Board found Girot's disability did not necessitate his retirement or suspension from duty because he actually completed his four-year term.

On review, both the Circuit Court and Appellate Court disagreed with the Pension Board and awarded Girot a not-on-duty disability pension. The Court explained that medical evidence in the record all concurred that Girot was disabled from CRPS as well as the medications needed to treat it. Therefore, the Boards decision on disability was against the manifest weight of the evidence. With respect to the Board's finding that Girot was not retired or suspended from duty due to the disability, the Court disagreed. The Court relied on *Batka v. Board of Trustees of the Village of Orland Park Police Pension Fund*, 186 Ill. App. 3d 715, 722 (1989), which previously interpreted the statute to mean "the plaintiff's disability rendered him unfit for duty". The Court pointed out Girot was unfit for duty due to his medications and further had a Deputy Chief appointed to assist him. ❖

Firefighters' Alleged Pre-employment Fraud Does Not Preclude Disability Benefits

The Village of Roselle v. The Board of Trustees of the Roselle Firefighters' Pension Fund and Ryan Case, 2021 IL App. (2d) 200360

Ryan Case began his firefighting career in 2002 and worked for various departments until he was hired by the Roselle Fire Department in 2015. Prior to his appointment to the Fire Department, Case suffered various back ailments treated conservatively with muscle relaxers. During the Fire Department's pre-employment process, Case completed pre-employment medical questionnaires and physical examinations during which he denied or omitted his well-documented history of back issues. Nonetheless, he passed said examinations and the Village hired him as a firefighter.

In 2016, while on duty and preparing for a fire department open house, Case injured his back carrying cases of water bottles in preparation for the event. Case was completing this task under the station maintenance rules of the Fire Department and orders from a superior officer.

Case applied for a line of duty disability and was found disabled by three (3) independent medical examiners as the result of the water carrying incident. During the disability process, evidence came to light suggesting Case may not have completely disclosed his prior medical issues to the Fire Department during the preemployment process. The IME physicians were provided additional records which did not alter their opinions as to Case's disability and its cause. After two (2) hearings, the Pension Board found Case disabled by an act of duty and awarded him a line of duty disability pension. The Village filed a complaint for administrative review alleging Case was not disabled from an act of duty and that he became a member of the Fire Department through deception and fraud by concealing prior and ongoing back problems.

The circuit court reversed the Pension Board's decision concluding Case was not injured during an act of duty and the Pension Board's determination it lacked authority to deny Case benefits after finding out he was untruthful at the time of hire was contrary to law. The circuit court ruled Case was not entitled to any benefit and further ordered the Pension Board to recoup any payments made to Case.

On appeal, the Second Appellate District Court addressed two issues. First, whether a pension board can deny a duty disability pension application based on preemployment misrepresentations; and second, whether Firefighter Case's injury occurred while performing an "act of duty."

The Court found the plain and ordinary reading of Section 4-110 (line of duty disability pension) restricts pension boards to consideration of only whether a firefighter "shall be entitled to a [duty] disability pension" if he or she "as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty *** is found *** to be physically or mentally permanently disabled from service in the fire department" and whether there is a causal link between the disabling injury and an act of duty." Whether a firefighter misrepresented his fitness for duty at the time of hire is not properly considered by the Pension Board in determining whether he is disabled.

The Appellate Court concluded objective medical imagining established a disabling condition did not exist before his appointment and the disabling event was unrefuted. As such, with the clear

objective evidence of the disabling injury, its cause and the unanimous findings of the IME's, the Court found the Board did not err in declining to consider the preemployment misstatements.

Confronting the Village's contention it was the pension board's fiduciary duty to screen out Case's claim as unqualified or fraudulent, the Court reiterated that a pension board's fiduciary duties under Section 4-110 do not give it authority or license to act as an investigative or prosecutorial body with respect to preemployment misstatements. However, the Court advised boards are not without recourse if disability applicants are later convicted of a felony in connection those alleged untruths.

Finally, the Court turned to the central issue, whether Case was performing an act of duty when he suffered his disabling injury. Here, the Village relied on *Frisby,* 2018 IL App (2d) 180218), a pre-shift slip and fall, to argue an "act of duty" under Section 6-110, as adopted by courts in Article 4 cases, must be undertaken for the purpose of saving life or property. The Court noted the Village clearly misread *Frisby's* holding and reiterated if a firefighter's on-duty action was required by law or fire department regulations, it would qualify as an act of duty regardless of whether it was undertaken for the purpose of saving life or property.

In summary, a firefighter may prove an act of duty by showing they were performing (1) "any act imposed on an active fireman by the ordinances of a city", OR (2) any act imposed by "by the rules and regulations of its fire department," OR (3) "any act performed by an active fireman while on duty, having for its direct purpose the saving of the life or property of another person." 40 ILCS 5/6-110. Here, Case was not required to prove his action was taken to protect life or property. Because he was acting pursuant to the order of a superior and the rules of the department, he was performing an act of duty when injured. As such, the Court reversed the circuit court's judgment and affirmed the board granting Case a line of duty disability. ❖

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.

REIMER DOBROVOLNY & LABARDI PC NEWS

- RDL partner Rick Reimer will present at the IPPFA Certified New Trustee Training on March 14, 2022.
- RDL partner Rick Reimer was a guest speaker at the Illinois Public Employers Labor Relations Assoc. (IPELRA) seminar on December 10, 2021.
- RDL partners Rick Reimer & Brian LaBardi presented at the IPPFA Illinois Pension Conference held both virtually and in person in Oak Brook from September 29-October 1, 2021.
- RDL partner Brian LaBardi presented at the IPFA Spring Pension Seminar November 5, 2021.

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