A Public Safety Law Firm

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REIMER DOBROVOLNY & LABARDI PC

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Legal and Legislative Update

Fire Consolidation Board Announces Asset Transfer Dates

On June 25, 2021, the Firefighters' Pension Investment Fund (FPIF) advised all Article 4 funds of their asset transfer date. Assets will be transferred in three stages on either October 1, 2021, November 1, 2021, December 1, 2021, or January 4, 2022. Individual boards should refer to the correspondence received from FPIF for the specific date on which its funds will be transferred. Included with the notice from FPIF was an instruction letter, draft resolution appointing authorized agents, and draft notice to custodians for consideration and execution by the local Article 4 funds. **Execution of these documents requires pension board action and should be added to the agenda for review, consideration, and potential approval at least 60 days prior to your fund's asset transfer date.** As noted in the instruction letter received from FPIF, once executed a certified copy of the resolution should be sent to FPIF and notice of the same sent to the local fund's custodian.

In This Issue…

FPIF has also advised our office local funds should expect to receive an operational mailing in the near future with additional information and letters of direction.

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 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. **This policy should be adopted and implemented prior to the transfer of assets.**

The announcement of transfer dates is the first step in what will be many in the near future implementing the consolidation of all Article 4 pension fund assets. Developments are expected to continue to occur quickly in this area in the near future. We will continue to keep firefighter pension funds up to date on any new developments.❖

Limited Opportunity to Transfer Prior Law Enforcement IMRF Time to Article 3

H.B. 126

On May 29, 2021, the Illinois Senate approved House Bill 126 which opens a window to transfer prior IMRF time to Article 3 Pension Funds. Under the Bill, an active Article 3 participant may apply to IMRF to transfer previous time served as a sheriff's law enforcement employee, person employed by a participating municipality to perform police duties, or law enforcement officer employed on a full-time basis by a forest preserve district. Unlike some prior IMRF opportunities, this Bill does not apply to any prior IMRF service but rather, is limited to those categories stated above. If a current member of an Article 3 fund falls into one of those categories, they must make application to IMRF within 6 months of the effective date of the Act. There is no limit to the amount of creditable service that may be transferred from IMRF to the current Article 3 fund.

Once the application is approved by IMRF, it will send the applicant's contributions with interest, an amount representing employer contributions equal to that amount, and any interest paid by the applicant to re-instate service to the Article 3 fund. Any former IMRF member who took a refund of contributions must reinstate their service by payment to IMRF of an amount equal to their refund plus interest at the actuarily assumed rate. Any reinstatement of refund payment must be made to IMRF within 90 days of notification by IMRF of the cost of such reinstatement.

An active member may choose to transfer their prior IMRF time to their current Article 3 fund upon payment of the difference between the IMRF transfer amount and the amount that would have been contributed had it been made at the Article 3 contribution rate plus interest at the actuarily assumed rate from the date of service to the date of payment. It is important to note this payment must

be made to the Article 3 fund no later than 6 months after the effective date of the Act.

At the time of this writing there is some uncertainty surrounding how to properly implement transfers under this new legislation. First, it should be noted the Governor has not yet signed this bill. As such, it is not yet effective. Any deadlines in the legislation tied to effective date have not yet begun to run and cannot be calculated at this time. In addition, it is not yet known whether the Department of Insurance will weigh in with an opinion and/or SIREN to further assist Article 3 Funds with these potential transfers. As presently construed, time is of the essence inasmuch as the Bill contemplates the same 6 month period to both make application to IMRF to transfer and complete the transfer to the Article 3 fund. Any member interested in this option should begin the process as soon as possible once the Bill is signed into law. Should any additional developments occur, we will keep you advised. ❖

Litigation Exception to OMA Narrowly Construed

City of Bloomington v. Raoul, 2021 IL App (4th) 190539

In this case, the Bloomington City Council went into closed session, claiming the litigation exception of the Open Meetings Act. The issue surrounded an intergovernmental agreement between Bloomington and Normal. The respective mayors and managers had been discussing various plans to terminate the agreement and options to reach that end. At a Council meeting, Bloomington entered closed session under the litigation exception to the OMA.

The exception at issue permits closed session to discuss:

"Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting." 5 ILCS 120/2(c)(11)

Bloomington's attorney advised the Council to limit their discussion to litigation, and reminded them to not discuss the public relations aspect in closed session. However, the Council discussed various options to terminate the agreement including the financial aspects of terminating and how to sell their decision to their constituents. Much of their concerns addressed how to best handle inquiries and criticism rather than the potential litigation.

The Court found this did not meet the statutory requirement needed to close a meeting. The Court did however, indicate that some discussion would qualify such as concern about the uncertainty of any outcome, how to best avoid a lawsuit, and whether Bloomington or Normal had or could use the threat of litigation in the course of negotiation.

The take away is to use this exception very narrowly, address only litigation concerns. ❖

FOIA Exception Leads to Redaction- Not Total Denial

Lucy Parsons Labs v. City of Chicago Mayor's Office, 2021 IL App (1st) 192073

Lucy Parsons Labs is a self-described "collaboration between data scientists, transparency activists, artists, and technologists working at the intersection of digital rights and on-

the-street issues." In this case, LPL made a FOIA request for Chicago's "action plan" in response to possible public unrest expected following the verdict in the Officer VanDyke murder trial. The City denied the request, citing a §7(1)(v) exception to FOIA. That exception allows denial if the release would disclose:

"Vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public."

The requester lost in the Circuit Court, but continued on Appeal. The Appellate Court ruled that the City could not make a wholesale denial. Use of this exception required the city to review the document, make necessary redactions, and withhold only the portions that would reasonably be expected to jeopardize safety. ❖

28,000 Page FOIA Not Unduly Burdensome on Volume Alone

Greer v. Board of Education of the City of Chicago, 2021 IL App (1st) 200429

In this case, Greer had previously filed numerous complaints alleging racial discrimination against the Board of Education. In 2018, Greer submitted a FOIA request seeking records related to those racial discrimination claims, between 1999 and 2005. Approximately 28,000 pages of records would need to be reviewed for potential exemptions. Due to this, the Board asked Greer to narrow his request, but he refused. Following his refusal, the Board denied Greer's request as unduly burdensome. The Circuit Court found in favor of the Board on summary judgement. However, the Appellate Court reversed, and remanded the matter back to the Circuit Court for further hearing. The Board had claimed that it would take 86 days to review 28,000 documents, based on a rate of 3 pages every 5 minutes, but the Appellate Court found this claim unrealistic as many documents need not be fully read to make a determination. Additionally, the Court addressed weather the burden outweighs the public interest in the information, finding that issues of racial discrimination were of high public interest. The Courts ruling did not definitively say that all requests for 28,000 pages were proper. What they did say, is that volume alone is not enough to trigger the "unduly burdensome" exception. ❖

Holiday Pay Must be "Fixed" to be Pensionable.

Village of Hanover Park v. Bd. of Trustees of the Village of Hanover Park Police Pension Fund, et al., 2021 IL App (2d) 200380

While they do not come along as frequently as disability matters, sometimes the most complex cases handled by police or fire pension boards concern pensionable salary. In this case, the question was whether holiday pay should be counted as part of salary for pension purposes for officers in Hanover Park.

The holiday pay issue in Hanover Park has a long and complicated procedural history. A 2010 DOI audit found holiday pay to be pensionable. The Pension Board disagreed with the DOI and, based on the Pension Board's opinion holiday pay was not pensionable, the Village did not withhold pension contributions on holiday pay.

A successor CBA was negotiated in 2013 and changes were made to the section pertaining to holiday pay removing language preventing the Village from withholding pension contributions for holiday pay. No other changes were made to the holiday pay section of the CBA.

In 2015, the Village received a DOI opinion advising holiday pay was not pensionable inasmuch as it was not "fixed" because it was not a "predetermined amount which can be determined though examination of the appropriation ordinance, plans or agreements establishing salary" under the Administrative Code.

The Village continued to make no pension deductions from officers' holiday pay. Several members filed grievances as a result. During the course of the arbitration of that matter, the parties introduced evidence that, while the contract included a requirement the officer must work the day before and the day after the holiday to qualify for holiday pay, that portion of the contract had not been enforced between 2007 and 2014 but was enforced from 2014 on. In 2018, the arbitrator found the Village in violation of the CBA for failing to withhold pension contributions on holiday pay. However, he also noted he did not have the authority to determine whether holiday pay was pensionable under Illinois law as only the pension board could make that determination.

Subsequent to the arbitrator's decision, the pension board held a hearing to determine whether holiday pay was pensionable. The pension board entered a written order finding holiday pay to be pensionable. The Village took administrative review of that decision. The Circuit Court of DuPage County upheld the pension board's determination holiday pay should be pensionable.

On appeal, the Village first argued the court lacked jurisdiction to hear the case as more than 35 days had passed from the date of retirement of the individual defendants and retirees and the date the pension board previously opined to the DOI holiday pay was not pensionable. The court first noted no formal written decisions memorializing pension benefits for the retired officers had been completed. As such, the court had no way of knowing when to start the 35 day clock. However, even assuming for arguments sake the 35 days had passed, the court found the 35 day limitation does not apply because the issue contemplates a potential systemic miscalculation by the pension board stemming from a rule or policy of the board. As such, the 35 day limitation did not apply.

Turning to the merits, the Appellate Court found the issue of whether holiday pay is pensionable turns on whether it is "fixed" compensation. The language of the CBA provided officers were eligible for holiday pay only if they worked their last scheduled day before and immediately following the holiday. Because of this condition, the Appellate Court found holiday pay was not "fixed" because it was not "a predetermined amount which can be determined through an examination of the appropriations ordinance, plans or agreements establishing salary." The Court reasoned holiday was not "payment in a predetermined amount" because not all officers received holiday pay. Rather, the amount received was dependent on the officer's attendance record. As such, the Court concluded it should not be considered part of pensionable salary holding, "There is no basis to treat variable holiday pay as pensionable salary where, as is the case here, the parties agree that officers were ineligible for such renumeration based on their work attendance and the straightforward application of the CBA."

Even though the Court in this case found holiday pay not pensionable, it is important to remember

that does not mean all holiday pay is not pensionable. Whether holiday pay should be included as part of pensionable salary is a fact specific determination which will vary by department. The Administrative Code provides holiday is pensionable if it is "paid regardless of whether the employee must work on the holiday, unless there is an option, such as time off in lieu of cash compensation". Assuming it also meets the definition of "salary", which was the issue in Hanover Park, it may still be pensionable. ❖

Governor Extends Remote Attendance Options But Warns of Expiration

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 June 25, 2021, Governor Pritzker signed the most recent Gubernatorial Disaster Proclamation which remains in effect through July 24, 2021. Those who have been following this issue will note the Governor has been issuing 30-day disaster proclamations in succession since March 2020. However, this last declaration included a statement by the Governor pertaining to attendance at the regular meeting location being "not feasible" wherein he alerted public bodies, "as the number of fully vaccinated individuals in Illinois continues to increase, I do not expect to make this finding again, and public bodies should plan on its expiration as of July 24, 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.

For now, the declaration running through July 24, 2021, declaration finds "in person attendance of more than ten people at the regular meeting location not feasible." Upon expiration of this provision, public bodies may still meet remotely if a disaster declaration has been issued however, members of the public must be able to gather at the

regular meeting location and be able to hear all discussion, testimony, and votes taken. While the Governor has indicated his intention to remove the blanket finding attendance at the regular meeting location is not feasible, that does not preclude a pension board president from making the same finding.

In short, holding pension board meetings solely via phone, video, or other electronic attendance continues to be permissible through July 24, 2021. Thereafter, if a pension board wishes to explore the option of holding a remote meeting with no one present at the regular meeting location, it should consult with its legal counsel to explore options. ❖

Consolidation Lawsuit Summary

As reported in our last newsletter, on February 23, 2021, a lawsuit was filed in Kane County challenging the Pension Consolidation Act. The case was reassigned to a different judge on motion of one of the defendant's and an amended complaint was filed June 11, 2021. Several of the defendants have filed Motions to Dismiss the complaint. At the time of this writing, those motions have not been heard or ruled upon by the Court. Updates may be checked at the Kane County Circuit Clerk under No. 21-CH-000055. ❖

Police Officers' Pension Investment Fund Update

Since our last newsletter, the Illinois Police Officers' Pension Investment Fund (IPOPIF) has hired Verus Advisory Inc. as investment consultant and Kent Custer as chief investment officer.

Verus advises on over $535 billion in assets for a wide range of clients including education and charitable originations and both public and private employer defined benefit plans.

Mr. Custer previously served as the Chief Investment Officer for the $2.0 billion investment trust fund at the Dallas Police and Fire Pension Systems. Prior to that, Mr. Custer was the Chief Investment Officer at the $1 billion Illinois Prepaid Tuition Trust Fund and served as a Senior Investment Officer with the Illinois Teachers' Retirement System.

In addition, the IPOPIF Board recently adopted its first administrative rule. The rule requires local Article 3 funds to take action to execute a resolution designating individuals as "authorized representatives" whose duties it shall be to forward IPOPIF communications to the rest of the local board and execute authorizations to allow sharing of investment information between the local fund and IPOPIF.

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. ❖

Limited Opportunity to Transfer Prior Article 3 Time to Article 4

H.B. 381

On May 26, 2021, the Illinois Senate approved House Bill 381 which opens a window to transfer prior Article 3 (police) service to an Article 4 (fire) pension fund. Under the Bill, an active Article 4 participant may apply to transfer up to 8 years of prior Article 3 police service to his current firefighters' pension fund provided they were not subject to disciplinary action when they terminated their police employment. The active firefighter has 6 months following the effective date of the

amendment to apply to his former Article 3 fund for transfer. Once the application is approved, the service is transferred to the current Article 4 fund upon payment by the prior police fund of an amount equal to the member's contributions, employer contributions in the same amount, and any interest paid by the member to reinstate service. Prior service terminated as the result of acceptance of a refund may be reinstated by payment to the police pension fund of the amount of the refund plus 6% interest compounded annually from the date of refund to the date of payment.

While the active firefighter has 6 months following the effective date to apply, at the time of this writing the Bill has not been signed by the Governor so the deadline is not yet known. Should any additional developments occur, we will keep you advised. ❖

Non-duty Disability Results without Causation for Police Officer

Strong v. Board of Trustees of the North Chicago Police Pension Fund, 2021 IL App (2d) 200417-U

In an unpublished opinion, the Second District Appellate Court, affirmed in part and reversed in part, the decision of the circuit court which overturned the pension board's decision outright denying any disability pension benefits and awarded line-of-duty disability pension benefits to Police Officer Strong.

In summary, Officer Strong applied for a line of duty disability pension and an alternative nonduty disability pension for a back injury allegedly suffered in an on-duty car accident while allegedly in pursuit of an offender.

Several pertinent facts were noted by the pension fund in denying Strong's disability. First, Strong claimed to have been in pursuit of a vehicle after smelling burnt cannabis at the time he collided with another vehicle. Notably, incident reports did not mention Strong in pursuit of another vehicle or a back injury. Second, Strong did not report low back pain until January 2016, approximately 3 months following the accident. Third, Strong was observed by a private investigator lifting a suitcase into his trunk while driving for Uber and working as a Target security guard; secondary employment positions he was not approved for. Fourth, Strong's credibility was in question as he previously falsified a police report several years prior to the accident for which he was suspended. Fifth, the pension board concluded Strong was not eligible for any pension as he signed a letter of resignation prior to filing for disability.

Alternatively, the pension board concluded even if he was disabled, the injury was not duty related.
At the circuit court level, the court found Strong disabled as a result of his on-duty accident and eligible for benefits.

On appeal, the pension board conceded he was eligible to apply for a disability pension but argued his disability did not result from the performance of an act of duty. The Appellate Court concluded the pension board's decision regarding Strong's disability was against the manifest weight of the evidence, but its causation determination was not.

In finding Strong disabled, the Court noted three independent medical examiners found Strong disabled. While acknowledging the board may accept the position of a single examiner, their position must be explained. Further the Court noted the board may not accept the position of one examiner over others if the position is based on misstatements or selective disregard of the evidence.

Here, the board accept the wavering position of a doctor who opined Strong might be able to return to full and unrestricted duty if he was evaluated by occupational health, underwent a third surgery, and underwent a functional capacity evaluation. The court found the doctor never unequivocally said Strong could return to duty and his opinion was subject to the latter contingencies. Considered in its entirety, the Court found the board did not have a sound basis for rejecting the other IME opinions and the board made no findings that the accepted doctor's opinion was most credible and persuasive.

Next, the court noted the board had no evidence as to the weight of the Uber passenger's suitcase and ignored the finding. Further, the court noted Strong's security guard position at Target required him to do no more than sit in a car as a deterrent and radio in messages of activity to his supervisor. Turning to causation, the Court focused on Strong's credibility. The court noted there was evidence supporting and refuting his claim. While the IME physicians concluded the accident caused his back injuries, the court was suspicious Strong did not first report back pain until several months later and the post-accident internal report did not have back injury listed. Further, the court found inconsistent Strong's testimony he experienced back pain and was treated for back pain in the ER where the medical records were to the contrary.

With conflicting evidence, the court deferred to the board's assessment Strong was not injured in the line of duty. Supporting the court's opinion, it noted highly relevant discrepancies in medical records, testimony and candor. The court highlighted Strong's lack of reporting a pursuit prior to the accident and previous discipline for dishonesty.

Because a doctor's opinion of causation may rely in whole or in part upon the patient's truthfulness, the court concluded the board reasonably discounted doctor's opinions that were based on contradictory information provided by Strong as to when his symptoms started.

The court concluded while Strong is disabled, the board rightly discounted the examining doctor's opinions on causation based on credibility and upheld the board's factual determination regarding the cause of Strong's injury. ❖

Suggested Agenda Items for October (or 4th Quarter)

Adoption of recommended tax levy from actuarial valuation and forward request to Municipality.

- Adoption of municipal compliance report and forward to Municipality.
- Schedule next calendar year quarterly meeting dates/times.
- Deadline for filing independent audit report with DOI.
- Deadline for filing of DOI annual report. (October 31st for fiscal years ending April 30)
- Begin RFP process on investment consultants, if necessary.

REIMER DOBROVOLNY & LABARDI PC NEWS

- RDL partners Rick Reimer & Brian LaBardi presented at the IPPFA Illinois Pension Conference held both virtually and in person in Lincolnshire from May 5-7, 2021.
- RDL partner Brian LaBardi presented at the IPFA Spring Pension Seminar held virtually on May 7, 2021.
- RDL attorney John Gaw presented training on the newly enacted police reform legislation in Round Lake Beach on behalf of The Prevent Group.
- RDL attorneys will attend and present at the IPPFA MidAmerican Pension Conference to be held at Oakbrook Hills Resort September 29-October 1, 2021.

Legal and Legislative Update

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This publication constitutes advertising material. Information contained herein should not be considered legal advice.
***Legal and Legislative Update* is published periodically. Questions may be directed to:**
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