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

Volume 16, Issue 3, July 2018

Legal and Legislative Update

Does "Act of Duty" Really Mean Simply Being On Duty and In Uniform? Another Appellate Court Seems to Think So!

Gilliam v. Bd. of Trustees of the City of Pontiac Police Pension Fd., 2018 IL App. (4th) 170232

All pension fund trustees have been led to believe the case law clearly establishes that simply being on duty and in uniform does not entitle police officers to a line-of-duty disability in the event they become disabled, absent an act involving special risk "unique" to police duty. In a recent Fourth District Appellate Court case, the lines between what constitutes an "act of duty" versus on duty, seems to be more blurred than ever.

In *Gilliam*, the officer submitted an application for disability benefits stemming from injuries suffered while riding a bicycle. The City of Pontiac intervened. The officer testified she was participating in voluntary training to learn to be a bicycle patrol officer.

The bicycle training in which Gilliam participated was voluntary and there are no state laws or regulations that require an officer to obtain a certification or go through this training course before performing bicycle patrol duties. The bicycle training class was not a prerequisite to serve as a sworn peace officer. Gilliam was not ordered to participate in the bicycle training course. The bicycle training course was not run by the Pontiac Police Department but was organized and run by the International Police Mountain Bike Association ("IPMBA") and taught by Sgt. Charles Summers of the Illinois State University Police Department.

Sgt. Summers explained the maneuvers and techniques taught during the IPMBA course are

In This Issue

similar, if not identical, to the techniques taught in civilian classes. When asked whether the "parallel curb ascent" maneuver was unique to police bicycle patrol, Sgt. Summers confirmed it was not.

Gilliam admitted she has ridden bicycles all her life. On the day of her injury, Gilliam was wearing her uniform, service weapon, and police gear. While attending the second day of the training course, Gilliam was attempting to learn "parallel curb ascending" as part of the bicycle training when she was injured. After attempting approximately a "half dozen" parallel curb ascents, she fell and landed on the concrete. Gilliam completed the day's bicycle training as well as the following two days of training. She submitted an injury report regarding her injury.

Following completion of the bicycle training course, Gilliam subsequently sought medical care for her injury. She underwent three surgeries on her left hand. Following the surgeries, Gilliam was released with permanent restrictions, and filed an application for disability benefits.

After conducting hearings, the Pension Board denied Plaintiff's line-of-duty disability pension but awarded a non-duty disability. While the Pension Board agreed Gilliam was disabled, it held she was not disabled due to an "act of duty." Specifically, the Pension Board held Gilliam was not involved in an activity involving special risk not normally encountered by civilian counterparts, but instead was performing an act with a common civilian counterpart. Based upon its finding of fact, the Pension Board held Gilliam was acting in a capacity similar to any other civilian who rode a bicycle. Moreover, the Board found Gilliam had presented no evidence demonstrating she was acting pursuant to a rule, regulation, ordinance, or statute at the time she was injured. Similarly, Gilliam failed to submit evidence she was engaged in an activity which had for its direct purpose the saving of the life or property of another.

Gilliam sought administrative review of the Pension Board's decision and order. The Circuit Court reversed the Pension Board's decision. The Pension Board then filed a timely Notice of Appeal. On appeal, the Appellate Court reversed. The Court recognized it is well settled that to be entitled to line-of-duty disability benefits, it is not enough that a police officer was injured while on duty. Further, the Court considered not all acts of police duty involve "special risk." The Court reviewed the seminal case interpreting "act of duty" and "special risk," *Johnson v. Retirement Board of the Policemen's Annuity & Benefit Fund.* (citation omitted) In *Johnson,* the Court held, "when a policeman is called upon to respond to a citizen, he must have his attention and energies directed towards being prepared to deal with any eventuality." *Johnson,* 114 Ill.2d, 522; 114 Ill.2d 518 (1986).

The *Gilliam* Court went on to analyze the various appellate court decisions in which an officer's conduct qualified for "line-of-duty" pension benefits. The Court apparently placed great emphasis on the Second District Appellate Court's decision in *Alm v. Lincolnshire Police Pension Board,* 352 Ill.App.3d 595 (2d Dist. 2004) In *Alm*, the Court relied heavily on *Johnson*, finding a bicycle patrol officer does not merely ride the bicycle as any ordinary citizen can, and often does. Rather, the bicycle patrol officer faces special risks not faced by ordinary citizens, including riding at night, remaining diligent on patrol while watching out for his own safety, and carrying additional weight with his service-oriented equipment. *Alm¸ 352 Ill.App.3d 602.*

The Court also recognized its own decision in *Jones v. Board of Trustees of the Police Pension Fund of the City of Bloomington*, 384 Ill.App.3d 1064 (4th Dist. 2008) In that case, the Court held an officer on routine patrol, who was injured as a result of a traffic accident, was entitled to line-of-duty disability benefits because he faced special risk while on patrol.

> Applying the case law and facts in *Gilliam*, the Court reasoned as follows:
> [Gilliam] was engaged in officer training for bicycle patrol at the time she was injured. According to the instructor, the training consisted

> of classroom training and hands-on techniques, both specifically designed for police officers. During the hands-on portion, the instructor taught the officers 'slow speed skills, front wheel lifts, braking techniques, curb assents and descents, and various dismounts." The particular training course was intended only for police officers and was designed to train the officers in the techniques to be utilized while on patrol. *Gilliam,* 2018 IL 170232 ¶35.

The Court also reviewed the IPMBA's website course description. The Court concluded the description of the course alone revealed the "special risks" associated with bicycle patrol, risks specific to officers, and not encountered by ordinary citizens.

Rejecting the Board's finding that ordinary citizens engaged in similar activities, the Court found what was unique to police officers, particularly in this case, was that bicycle patrol officers must perform the maneuvers taught at the training course while on patrol. Explaining further, the Court summarized as follows:

> This means the officer must use the learned skill as a safety maneuver, a diversive maneuver, or as an assertive maneuver in a felony pursuit. Regardless, the officer would be performing the maneuver while experiencing the associated risks and dangers unique to the police profession. Plaintiff was learning how to perform the maneuver in the capacity of a bicycle patrol officer. *Id.* at ¶38.

The Pension Board has filed a Petition for Leave to Appeal (PLA) with the Illinois Supreme Court. The *Gilliam* decision comes on the heels of the Fifth District Appellate Court's decision in *Martin v. Board of Trustees of the Police Pension Fund of the Village of Shiloh,* 217 Ill.App. (5th) 160344, wherein the Appellate Court affirmed the reversal of a pension board's finding that an officer, who was a passenger in a squad car returning from court, was not entitled to a line-of-duty disability pension. These cases indicate a growing trend among the various appellate districts expanding the definition and application of "act of duty" in considering whether line-of-duty disability benefits should be awarded. Does this mean that any officer engaged in any type of police training will automatically be entitled to line-of-duty disability benefits if they become disabled while performing that training? We will have to see. ❖

DOI Corporate Bond Information Requests Create Mass Confusion

During the course of the last month, the Department of Insurance bombarded Article 3 and 4 pension funds with requests for information on the fund's corporate bond holdings. These ominous letters suggested the fund held illegal, non-investment grade corporate bonds, and suggested a breach of fiduciary duty may have occurred.

Having responded to scores of these letters, very few were cause for actual concern. It appears as though the letters were spurned by review of fund's DOI annual statements. The annual statements report a single bond rating for these investments. In most cases, it appears the letter was triggered because the single reported rating was either N/A or below investment grade.

Recall pursuant to the Pension Code, corporate bonds are a permissible investment when managed through an investment advisor and meeting the following requirements:

(1) The bonds must be rated as investment grade by one of the 2 largest rating services at the time of purchase.

(2) If subsequently downgraded below investment grade, the bonds must be liquidated from the portfolio within 90 days after being downgraded by the manager.

See 40 ILCS 5/1-113.2(14).

While the overwhelming majority of these letters identified no Pension Code violation, as fiduciaries, pension boards are encouraged to ensure their investment advisors are keeping the Board apprised of any rating issues within the corporate bond portfolio they manage. ❖

FOIA Reminder: Not All Records Are "Public Records"

City of Danville v. Madigan, 2018 IL App (4th) 170182

The FOIA requires production of "public records". But what is a public record? Anything possessed by the public body? Evites to holiday parties sent to public email domains? This recent case explored what records in possession of a public body are subject to the FOIA.

The requestor sent a FOIA to the City seeking records related to the Danville Housing Task Force. The City denied the request arguing the Task Force was not a public body under the FOIA. The Public Access Counselor found the request had been submitted to the City- not the Housing Task Force. No party disputed the City was subject to the FOIA.

The Appellate Court agreed the FOIA was properly submitted to a "public body" – the City. The Court then turned to the inquiry of whether the documents requested constituted "public records" under the FOIA. In order to qualify as a "public record" under the FOIA, the records must "pertain to the transaction of public business". The term "public business" is not defined by the statute however, the Court applied the dictionary definition that, in order to qualify as a public record, "a communication must first pertain to business or community interests as opposed to private affairs."

Applying this definition, the Court found the requested records pertained to the transaction of public business inasmuch as they concerned business or community interests and not private affairs. Namely, the Task Force recommendations were intended to set forth the City's housing strategy for a five-year planning period upon which City officials would depend in making decisions related to City planning.

In short, remember not every record possessed by a public body will be subject to the FOIA. If the record pertains to private information or falls under an exception to the FOIA, disclosure is not required. ❖

Case of First Impression: Harvey Police Pension Fund Employs Comptroller Intercept

A 2010 amendment to the Pension Code gave underfunded pension funds the opportunity to petition the State Comptroller to intercept State funds earmarked for a municipality and divert those monies to the pension fund. The amounts a pension found could receive were based on a graduated scale beginning with fiscal year 2016 however, the Comptroller did not adopt the rules necessary to implement this new section of the Pension Code until this year.

Taking advantage of the new intercept statute, the Harvey Police Pension Fund sent notice to the Comptroller of delinquent amounts owed to the Pension Fund. The City failed to respond to the Police Pension Fund's notice before the Comptroller and her office set aside over $1 million otherwise payable to the City.

In response, the City filed a lawsuit in Cook County Circuit Court disputing the amount withheld, the Comptroller's ability to withhold any amounts, arguing the monies were earmarked for bondholders with superior rights, and generally denying it had levied less than the Pension Code required.

In the first of many procedural steps, the Circuit Court denied the City's request for a temporary

Reimer & Dobrovolny PC Firm Updates

RD is pleased to announce the promotion of attorney Brian LaBardi to partner effective July 1, 2018. Brian has been with the firm for the past six years focusing on public sector pension law, civil/appellate litigation, and employment/labor issues for police officers and firefighters. You may have seen Brian presenting at an IPPFA or IPFA conference.

Prior to joining Reimer & Dobrovolny, Brian was an Assistant State's Attorney with the Kendall County State's Attorney's Office – heading its civil division. While at the State's Attorney's Office, Brian was responsible for advising governmental entities on open government regulations such as the Open Meetings Act and the Freedom of Information Act. Handling a variety of civil litigation defense claims on behalf of County entities and employees, Brian litigated civil and quasi-criminal claims in both the Circuit Court and before administrative bodies.

Brian also has an extensive background in private practice civil litigation. Brian has defended professional malpractice claims, commercial litigation claims, business litigations claims and serious injury claims. In addition, he has authored and argued before State appellate courts and submitted briefs in the United States Supreme Court.

Brian received his undergraduate degree from Valparaiso University and his law degree from The John Marshall Law School in 2006 where he was on the Dean's List. He is licensed to practice law in Illinois, the United States District Court for the Northern District of Illinois, and the Seventh Circuit Court of Appeals.

restraining order and preliminary injunction and allowed the Comptroller to continue withholding monies from the City for payment to the Police Pension Fund. In response, the City moved to lay off a number of police officers and firefighters.

The City immediately appealed the Circuit Court ruling. Acting quickly, the First District Appellate Court issued a temporary restraining order barring the Comptroller from withholding from the City the monies set aside for the Police Pension Fund. Acting shortly thereafter, the Illinois Supreme Court vacated the temporary restraining order and sent the case back to the Circuit Court for a hearing on the City's request for preliminary injunction as soon as possible. No explanation was included with the Supreme Court's order.

Upon return to the Circuit Court, a temporary restraining order was granted at the request of the Firefighters' Pension Fund. Simultaneously, the Comptroller ruled bond tax revenue would continue to be paid to municipal bondholders collected as a result of special city sales tax created to fund those issuances. The Comptroller found the pension fund could not attach those revenues.

While settlement talks between the City and both police and fire pension funds continue, the Circuit Court has ordered some of the sequestered funds be paid to the pension funds. However, at the time of this writing, the case remains pending in the Circuit Court.

As a case of first impression under the newly enacted Comptroller intercept rules, we will keep a close eye on further developments. The outcome in this case has the potential to have a tremendous impact for Article 3 and 4 pension funds, municipalities, and municipal bondholders. Stay tuned. ❖

No Injunction Preventing Reduction of Pension Benefits Due to Overpayment

Almeida v. Bd. of Trustees of the Elgin Police Pension Bd., 2018 IL App (2d) 180129-U

In 2010, Plaintiff's claim for disability pension benefits was denied by the Elgin Police Pension Board. On appeal, Plaintiff was awarded a not in the line of duty disability benefit. Pursuant to Pension Code requirements, Plaintiff was sent for annual evaluations to determine whether he remained disabled. In 2014, the Pension Board found Plaintiff no longer disabled and terminated his disability pension. The Circuit Court reversed the Pension Board determination, but the Appellate Court affirmed the Pension Board finding Plaintiff's disability benefit should be terminated. While this case played out on appeal, the Pension Board continued to pay Plaintiff his usual non-duty disability benefit and did not file a motion to stay the judgment of the Circuit Court while the case was on appeal.

As a result of the above procedural wrangling, Plaintiff was overpaid $57,625.74 in disability pension benefits. The Pension Board sent notice to Plaintiff it would reduce the amount of his retirement benefits accordingly.

Plaintiff filed suit in the Kane County Circuit Court seeking, among other things, a temporary restraining order and preliminary injunction preventing the Pension Board from adjusting his retirement benefits. The trial court granted the order.

In reversing the grant of preliminary injunction, the Appellate Court found Plaintiff could not meet three of four criteria necessary to grant the injunction. First, the Appellate Court found Plaintiff would not suffer irreparable harm without the injunction. The Pension Board action purports to withhold overpayments from Plaintiff's retirement benefits. According to the Appellate Court, Plaintiff would not be eligible for regular retirement benefits until age 60- eight years from now. As such, Plaintiff would not realize any reduction in benefits for some time and could therefore not demonstrate irreparable harm. In addition, the Appellate Court found Plaintiff had an adequate remedy at law. Specifically, money damages for any wrongful reduction of his retirement benefit.

Finally, the Appellate Court found the Plaintiff could not demonstrate a likelihood of success on the merits. The Court found Section 3-144.2 of the Pension Code granted the Pension Board the statutory authority to recover the $57,625.74 overpayment by deducting that amount from his future benefit payments. In so finding, the Court distinguished the *Rossler* line of cases holding adjusting of pension benefits could only be made if overpayment was due to fraud, misrepresentation, or error. The Court found no determination had been made by the Pension Board on Plaintiff's retirement benefits and even if it had, the amended version of Section 3-144.2 allows the pension board to modify the benefit to recoup overpayments.

It should be noted the Appellate Court's findings allowing the Pension Board to adjust Plaintiff's retirement benefits to recoup overpayments under Section 3-144.2 are related only to the denial of injunctive relief. A final determination on that issue will have to be issued by the trial court after final resolution of the case on its merits. However, the Appellate Court's interpretation of Section 3-144.2 in this context appears to grant Pension Board's broad authority to recoup potential overpayments in certain circumstances. ❖

Firefighters' Colon Cancer Line of Duty Death Benefit Headed to Court

Village of Buffalo Grove v. Buffalo Grove Firefighters' Pension Fund, Lake Co. Circuit Court

The Buffalo Grove Firefighters' Pension Board's award of line of duty death benefits to widower Kim Hauber has garnered extensive media

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.
- Begin RFP process on investment consultants, if necessary.

coverage and several letters to the editor in major newspapers.

Recall, an eligible surviving spouse will receive 100% of salary attached to rank for an active firefighter who dies in the line of duty. The surviving spouse of an active duty firefighter who dies as a result other than an act of duty will receive 54% of salary attached to rank or the pension the firefighter was then entitled to, whichever is greater.

With the above statutory framework in mind, the various media reports in the Hauber matter indicate the Village of Buffalo Grove filed an action for administrative review of the Firefighters' Pension Board's grant of line of duty death benefits to surviving spouse Kim Hauber, the wife of Kevin Hauber who died of colon cancer.

According to the Complaint filed by the Village, Hauber was first diagnosed with cancer in 2014. He recovered and return to duty in 2015. In 2017 Hauber's cancer returned and he applied for line of duty disability benefits. Hauber passed away while that application was pending.

While two of three pension board doctors found Hauber was at increased risk of colon cancer because of his occupation as a firefighter, the Village alleges in its complaint the doctors did not identify specific acts causing the cancer. The Village complaint also alleges the pension board incorrectly applied the occupational disease disability presumption to this line of duty matter. Combined with what the Village terms a lack of evidence Hauber was exposed to "harmful elements" that could be attributed to his cancer, the complaint asks the Circuit Court to find the Pension Board decision against the manifest weight of the evidence and instead award a lesser level of survivor's benefits.

It is important to remember the facts have yet to be developed fully before the Circuit Court inasmuch as the administrative review action was only recently filed. However, we will continue to monitor this case as few reported cases deal with survivor's benefits in this scenario. ❖

Simply Driving a Squad Car Does Not Equal an "Act of Duty"

Hurd v. Bd. of Trustees of the Maywood Police Pension Fund, 2018 IL App (1st) 163368-U

In an un-published decision, the First District Appellate Court affirmed the Maywood Police Pension Board's determination on Officer Keeling's application for line-of-duty disability benefits. The Pension Board denied the claim, finding Officer Hurd failed to demonstrate his disabling injury resulted from an "act of duty."

There was no dispute Ofc. Hurd suffered a disabling injury to his right wrist from a vehicle accident which occurred while he was "on patrol." Ofc. Hurd was driving a squad car when a civilian motorist ran a red light and crashed into Ofc. Hurd's squad car. Ofc. Hurd claimed he was "on

patrol" at the time of the accident. However, he could not confirm whether he was driving within his beat or assigned area at the time. Ofc. Hurd was not responding to a call.

Ofc. Hurd testified he "complained to everybody" when he returned to the police station after the accident, including a sergeant he claimed was his supervisor that day. The sergeant in question, however, testified she did not work the same shift as Ofc. Hurd and had no knowledge of his accident. The Pension Board voted to deny Ofc. Hurd line-of-duty disability benefits but did vote to grant non-duty disability benefits. The Pension Board found Ofc. Hurd to be evasive and not credible as a witness. The Pension Board concluded Ofc. Hurd failed to demonstrate he was "on patrol" rather than simply driving around, much like any civilian driver.

On administrative review, the circuit court affirmed the Pension Board's decision. On appeal, the First District Appellate court also affirmed. In its analysis, the Appellate Court noted, "A police officer does not perform an 'act of duty' just by being 'on duty' at the time of the accident." "Not all police functions involve special risk." The Appellate Court reviewed previous Illinois decisions regarding the scope of "act of duty," specifically noting the holdings of the Illinois Supreme Court in *Johnson v. Retirement Board of the Policemen's Annuity & Benefit Fund*, and the appellate decisions in *Alm v. Lincolnshire Police Pension Bd.* (2d Dist.), *Jones v. Bd. of Trustees of the Police Pension Fund of the City of Bloomington* (4th Dist.), and *Rose v. Bd. of Trustees of Mt. Prospect Police Pension Fund* (1st Dist.). The Appellate Court found those cases where an officer had been driving a squad car to be distinguishable from Ofc. Hurd's actions.

The Appellate Court further observed the courts must look to the nature of the actions of the officer at the time of injury. "The courts…have not universally concluded that riding in, or driving, a squad vehicle is an act of duty." The Appellate Court reiterated, "the proper focus is on the particular activities the officer is engaged in when he or she is injured, not the title or general nature of the officer's duty assignment." The Appellate Court found the record supported the Pension Board's decision, citing Ofc. Hurd's failure to provide evidence he was responding to a call, engaged in an investigation, or was even in his assigned patrol area. The Appellate Court confirmed Ofc. Hurd had not been "performing an activity involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life."

Reimer & Dobrovolny PC represented the Pension Board in this matter and is pleased with the Appellate Court's affirmation of the pension board's decision. This decision is seemingly at odds with the recent decisions in *Gilliam v. Board of Trustees of the City of Pontiac Police Pension Fund*, and *Martin v. Board of Trustees of the Police Pension Fund of the Village of Shiloh*. In both of those cases, downstate appellate courts applied a less stringent view of what activities rise to the level of an "act of duty". The Pension Board has petitioned the First District to publish its decision to permit pension boards to cite to and rely on this case as precedent. ❖

Older Police Disciplinary Records Not Subject to FOIA

Johnson v. Joliet Police Dept., 2018 IL App (3d) 170726

Plaintiff sent a FOIA request to the Joliet Police Department seeking "disciplinary history" for a specific employee. The Police Department took "disciplinary history" to mean discipline imposed from citizen complaints and responded the employee did not have any citizen complaints filed against him. The response also noted records of discipline action which are more than four years old must be deleted under the Personnel Record Review Act.

In response, Plaintiff clarified he was seeking any records related to discipline concerning the employee including reports, complaints, letters of reprimand, or any other records of disciplinary action. The Police Department responded it had no

records of the type described within the last four years.

The Appellate Court agreed the records sought by Plaintiff were exempt from the FOIA under the Personnel Records Review Act. That Act requires disciplinary reports, letters of reprimand, or other records of disciplinary action to be deleted if they are more than four years old. As such, the Police Department response it possessed no responsive records within the last four years was appropriate.

In finding these records exempt from FOIA, the Appellate Court distinguished recent police FOIA cases finding citizen complaint registers subject to the FOIA. (See *F.O.P. Lodge 7 v. City of Chicago*, *Watkins v. McCarthy*, and *Kalven v. City of Chicago*). The Court in this case noted the requests in those cases sought production of citizen complaint registers. Those registers did not constitute the type of disciplinary records covered by the Personnel Record Review Act. As such, the citizen complaint registers were covered by the FOIA while the discipline records sought by this requestor were exempt pursuant to the Act. ❖

REIMER & DOBROVOLNY PC News

- April 5, 2018, R&D partner Rick Reimer taught at the IPPFA certified trustee training seminar in Hoffman Estates.
- April 30-May 4, 2018, R&D partners Rick Reimer and Jim Dobrovolny presented at and attended the IPPFA Spring Seminar in East Peoria, Illinois.
- May 4, 2018, R&D partner Brian LaBardi presented at the IPFA Spring Seminar in Addison, Illinois.
- June 6, 2018, R&D partner Rick Reimer taught at the IPPFA Retirement Coordinator Class in Hoffman Estates, Illinois.
- July 30-31, 2018, R&D partner Rick Reimer will attend the IPPFA National Roundtable Conference at the Abbey Resort in Fontana, Wisconsin.
- August 16, 2018, R&D partner Rick Reimer will teach at the IPPFA certified trustee training seminar in Hoffman Estates.
- September 13, 2018, R&D partner Rick Reimer will teach at the IPPFA certified trustee training seminar in Hoffman Estates.
- October 2-5, 2018, R&D attorneys will present at and attend the IPPFA Fall Conference in Lake Geneva, Wisconsin.

Legal and Legislative Update

Volume 16, Issue 3, July 2018

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:

REIMER & DOBROVOLNY PC
A Public Safety Law Firm
15 Spinning Wheel Road, Suite 310, Hinsdale, IL 60521
(630) 654-9547 Fax (630) 654-9676
www.rdlaborlawpc.com