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# Legal and Legislative Update

## *Cook County Circuit Court Rules a Minor Dependent Child is a "Surviving Spouse" For Purposes Of §5/3-112(e), 100% Line Of Duty Survivor Benefits*

*Masterton v. Village of Glenview et al., Circuit Court of Cook County,* Case No. 2018 CH 3503

On December 6, 2014, Glenview Police Officer Owen Masterton suffered a fatal heart attack while at the police station before beginning his shift. At the time of his death Officer Masterton was divorced, had not remarried, and left a 10-year-old son with his ex-wife Kelly, the guardian of the son's estate. At the time of his death, Officer Masterton was still in service as a police officer with nineteen (19) full years of creditable service.

On January 2, 2015, an attorney initially representing the family sent an email to the Pension Board's attorney questioning whether the Glenview Police Pension Board could commence payment of an undisputed 50% non-duty pension (sic) to the dependent son, while the coroner/medical examiner was determining the cause of Officer Masterton's death. The Pension Board's attorney responded the Pension Board could commence payment to a dependent child on an interim basis, without prejudice, to any line of duty survivor claim. The attorney was further advised that upon review of §3–112(e) of the Illinois Pension Code, it was not clear whether a "dependent child" would be entitled to a line of duty "surviving spouse" benefit.

On February 18, 2015, the Pension Board voted to grant "survivorship" (non-disability) benefits to Officer Masterton's dependent child, until he turned eighteen (18). Benefits were granted "without prejudice" and "pending attorney approval." On February 3, 2017, attorney for Guardian/Estate filed a request the Pension Board "review its determination to award a 50% pension to survivors under 40 ILCS §3–112(c), and award a pension subsequent to 40 ILCS 5/3–114.1(a) (sic)."

### In This Issue

Section 3-112(e) would allow a "surviving spouse" of a police officer that dies as a result of performance of an act of duty, lifetime benefits based upon 100% of salary at the time of the officer's death. On or about April 3, 2017, the Village of Glenview filed its Motion to Intervene.

A hearing was held before the Pension Board on August 30, 2017. The purpose of this hearing was threefold. First, to determine whether the Village's Motion to Intervene be granted. Second, whether the Village's Motion to Dismiss for lack of jurisdiction should be granted. Third, whether the Pension Board had jurisdiction to award a "dependent child" a "line of duty surviving spouse" benefit under §3–112(e) of the Illinois Pension Code.

The Pension Board Trustees voted on August 30, 2017, and issued its written Decision and Order on February 13, 2018, setting forth its determinative reasoning. In its Decision and Order, the Pension Board reached the following determinations: (1) The Village's Motion to Intervene was granted, without objection; (2) The Village's Motion to Dismiss based on the Pension Board's lack of jurisdiction was denied; and (3) Plaintiff's claim for surviving spouse benefits was dismissed for lack jurisdiction because Plaintiff's minor child did not qualify as a "surviving spouse" under §3–112(e) of the Illinois Pension Code. The Pension Board did not address or reach any determination regarding the merits of whether there was any basis for line of duty death benefits. In other words, no determination was made as to whether Officer Masterton's death was from "performance of an act of duty." The dependent son was awarded the "dependent children's" survivor benefit under §3-112(c) of the Pension Code. This benefit will be received until he reaches age 18.

The Guardian/Estate filed a timely Petition for Administrative Review. In her Memorandum, Guardian/Estate argued the Pension Board misinterpreted §3–112 of the Pension Code and that a "dependent child" should be considered a "surviving spouse" for purposes of §3–112(e) of the Illinois Pension Code.

After the matter was fully briefed, and without oral arguments, the Trial court issued its Memorandum Opinion and Order. In its March 22, 2019 Memorandum Opinion and Order, the Judge rejected the Pension Board's conclusion and the Village's assertion that §3-112(e) of the Illinois Pension Code precluded Plaintiff from eligibility for line of duty death surviving spouse benefits. The Court stated, "In sum, the Court finds Defendants' arguments (and the Pension Board's ruling below) focus too narrowly on the single phrase "surviving spouse."

The Trial Court then granted Plaintiff's Petition for Administrative Review, and reversed and remanded the matter to the Pension Board for further proceedings. Inexplicably, the Memorandum Opinion and Order provided, "This is a final and appealable order." The Trial Court did not address the issue of whether the Pension Board lacked statutory authority to grant benefits on an interim basis or award of additional benefits under the Illinois Pension Code, or whether or not Plaintiff's claim for line of duty death surviving spouse benefits was precluded under the Administrative Review Law.

On April 19, 2019, the Village filed a timely Petition for Leave to Appeal pursuant to Illinois Supreme Court Rule 306(a)(6) (interlocutory appeal). The Pension Board filed its Answer on May 10, 2019. On May 16, 2019 the Appellate Court denied the Petition without explanation.

As a result, the Pension Board will be forced to conduct evidentiary hearings to determine whether Officer Masterton's death resulted from performance of an act of police duty. This is one of several line of duty death cases being considered in the court system. ❖

## *What is a "Mistake in Benefit"?*

*Ray v. Beussink & Hickam, P.C.*, 2018 IL App(5th) 170274

In August of 2014, the Legislature amended both Article 3 and Article 4 of the Pension Code to add Sections 3-144.2 and 4-138.10 both entitled "Mistake in Benefit". Among other things, these

amendments were at least ostensibly designed to addresses overpayment of pension benefit issues. However, the rather narrow definition of "mistake" seems to result in the exception swallowing the rule in this instance. For example, the statute provides the term "mistake" shall not include overpayments related to the, "calculation of the benefit as related to salary, service credit, calculation or determination of a disability, date of retirement, or other factors significant to the calculation of the benefits that were reasonably understood or agreed to by the Fund at the time of retirement." This leaves the reader wondering how a pension board could ever make a "mistake". Prior to this amendment, Article 3 simply provided overpayments due to, "Fraud, misrepresentation, or error" could be deducted from future benefit payments.

With no case law interpreting the amended version of the statute, pension boards and practitioners have little guidance in how the amendment should be interpreted when a potential "overpayment" is encountered. However, the 5th District Appellate Court was recently asked by a trial court to answer a certified question pursuant to Supreme Court Rule 308 dealing with the amended version of Section 3-144.2 of the Pension Code.

Factually speaking, the Plaintiff, Kerry Ray, retired as interim chief for the City of Anna. He consulted with accounting firm Beussink & Hickam who served both as Chief Ray's personal accountants as well as accountants for the pension board. They advised Ray would be retiring at the salary attached to rank for the Chief. Acting on this advice, Ray retired and the pension board began paying a benefit based on his salary as Chief of Police. However, a subsequent DOI audit found this calculation incorrect because Ray had not served for at least 12 months in his temporary position as Chief of Police. Approximately two years after Ray retired, the pension board reduced his retirement benefits by $4,000 per year due to this "mistake".

Ray filed a malpractice suit against the accounting firm. Reviewing the amended version of Section 3-144.2 of the Pension Code, the trial court asked the Appellate Court to advise whether the police pension board can reduce the benefit awarded to Ray based on this "mistake" two years after granting the benefit.

In advising the trial court the pension board improperly adjusted the benefit, the Appellate Court first found the award of pension benefits to Ray was a "final decision" subject to the 35 day review period of the administrative review law because he began receiving benefits, the award was included in a DOI audit, and it terminated proceedings before the pension board.

The Appellate Court next grappled with which version of the overpayment statute to apply. Here, the alleged "mistake" occurred when the pension board award benefits to Ray in March of 2014 but was not discovered until 2016 by which time the amended version of the statute was in effect. First, the Appellate Court found the triggering event to be the date benefits were finalized as opposed to the date of discovery of the mistake. Next, the Court concluded the amendments to Section 3-144.2 were not intended to be applied retroactively. As such, the prior version of the statute applied.

Using the prior version of the statute, the Court found the overpayment to Ray did not constitute an "error". Citing the *Rossler* and *Kosakowski* cases finding an "error" under the prior version of the statute must be an arithmetical error, the Court found the pension board had not made one in setting Ray's pension benefits. Rather, the mistake was which salary to use in computing Ray's retirement benefits. As such, under the prior version of the statute, because 35 days had passed and no arithmetical error had occurred, the police pension board could not change the benefit it granted to Ray.

While the Appellate Court applied the prior version of Section 3-144.2 of the Pension Code, it went on to opine the term "mistake" as defined in the amended version, means the same as "error" as used in the prior version of the statute – namely, an arithmetical error.

## ***Reimer & Dobrovolny Welcomes New Attorney Bryan Strand***

Bryan Strand is an associate attorney at Reimer & Dobrovolny PC. He focuses in the area of public sector labor and employment matters and public sector pension law. In addition to public sector law, Mr. Strand practices transaction real estate law.

Mr. Strand graduated magna cum laude from Illinois State University, earning a Bachelor of Science in Criminal Justice. After receiving his degree, he began serving as a full-time police officer with a municipal agency.

In 2008, Mr. Strand left full-time law enforcement to attend Marquette University Law School. During law school Mr. Strand worked as a part-time police officer with his prior municipal agency and a part-time marine unit Deputy with a Sheriff's Office. Mr. Strand graduated from Marquette in 2012, earning a Juris Doctor.

After graduating law school, Mr. Strand returned to full-time law enforcement as a police officer with a State of Illinois administrative agency and a municipal agency where he became a certified HFRG/PPCT Defense Tactics instructor, HFRG/PPCT Edged Weapon instructor, field training officer (San Jose model) and Breath Analysis Operator. While working for the State of Illinois, Mr. Strand served 5 years as the agency's statewide Union Steward. During his tenure as the Union Steward, including 4 years under the anti-union Rauner administration, he successfully represented fellow officers in numerous discipline and overtime pay matters. Mr. Strand, since leaving the agency, continues to fight for the job of an officer who was unjustly terminated 3 years ago and whose arbitration hearing is still outstanding.

While other recent cases have found pension boards have some limited ability to modify a pension benefit granted after 35 days, this is the first case dealing with the amended definition of "mistake" in Section 3-144.2. It also confirms the amendments to Section 3-144.2 are not to be applied retroactively. It is significant to note the pension board was not a party to this case. Since the Appellate Court only answered the certified question, it was remanded to the trial court for further proceedings. Stay tuned. ❖

## ***Fire Line-of-Duty Disability Pension Based upon Duty-Related Aggravation of a Pre-Existing Condition must Establish a Causal Connection Disability and Act-of-Duty***

*McCumber v. Board of Trustees of Oswego Fire Protection District Firefighters' Pension Fund,* 2019 IL App (2d) 180316

Former firefighter Brian McCumber ("Plaintiff"), was hired by the Oswego Fire Protection District ("District") as a full-time firefighter/paramedic September 2, 2009 after serving the District as a part-time, contract firefighter/paramedic. Prior to his full-time appointment, Plaintiff passed a

physical and psychological evaluation. Between 2010 and 2014, Plaintiff fought 12-20 structure fires without issue. In November 2015, Plaintiff applied for a line-of-duty disability based upon anxiety disorder, a psychological condition, that manifested symptoms during three live-fire training exercises.

During the training exercises, Plaintiff dressed in full bunker gear including a self-contained breathing apparatus ("SCBA") and was instructed to rescue a mannequin from a "burn tower" as if it were an actual emergency. Plaintiff became disoriented, overexerted, lightheaded, had difficulty breathing and had to be assisted out after a "mayday" call.

Plaintiff testified he had not experienced shortness of breath or anxiety at work prior to the October 29, 2014, training incident. On cross examination, Plaintiff admitted on September 19, 2006, while participating in a burn tower training exercise as a part-time District firefighter, he collapsed while removing a mannequin and was removed from the burn tower for medical evaluation.

Additionally, Plaintiff had received an April 2010 "new recruit" burn tower evaluation which indicated he was uncomfortable in SCBA, hyperventilated and showed anxiety symptoms.
The administrative record revealed Plaintiff was diagnosed with "depressive disorder" in October 2009 and morbid obesity in July 2013. Plaintiff was 100 pounds overweight during the cited training incidents.

The Pension Board had Plaintiff evaluated by three independent medical examiners who were licensed to practice medicine and certified in psychiatry. Two out of three found him to be disabled.

Dr. Shaw found Plaintiff disabled due to anxiety/panic symptoms occurring during training and presumably real-life situations which were likely to reoccur when placed in stressful situations uncluding instances where SCBA gear would be necessary.

Dr. Shaw found Plaintiff had a history of difficulty (hyperventilation and anxiety) in SCBA situations and this difficulty was due to an underlying, preexisting predisposition to anxiety in specific situations which pre-dated his fire employment and not directly caused by circumstances other than those typical to the occupation. In summary, Dr. Shaw opined, "[Plaintiff's anxiety disorder] was not caused by the job, but became evident during certain specific duties which are necessary in order to perform his job."

Dr. Reff found Plaintiff disabled in that he could not fully participate in the live fire training exercises essential to be a firefighter/paramedic. Dr. Reff opined Plaintiff demonstrated anxiety in training exercises as early as September 2009. The training incidents Plaintiff cited represented an aggravation of his pre-existing specific anxiety related to wearing SCBA in training exercises. External stressors caused Plaintiff's anxiety disorder to become more pronounced in training. Dr. Reff found no evidence that would support Plaintiff's inability to function during live fire calls. Rather his distress is likely based upon a response to some psychological phenomenon stimulated during training.

The third IME doctor, Dr. Weine found the Plaintiff not disabled. He further opined Plaintiff does not meet the criteria for any psychiatric disorder or disability which would explain his inability to pass. Dr. Weine believed Plaintiff's morbid obesity and lack of conditioning was more likely the culprit.
The District's physician found Plaintiff unfit for duty because wearing an SCBA is an integral part of the job. The Plaintiff's counselor concluded the anxiety was caused not by the SCBA but by the training structure.

The Pension Board found Plaintiff's psychological issues, manifested during training exercises, rendered him disabled from full, unrestricted fire service but denied his line-of-duty disability pension. The Board found Plaintiff failed to meet his burden of proof the training exercises caused or contributed to his disability. On administrative review, the circuit court affirmed the Board's decision.

On appeal, the Appellate Court agreed with the Board's findings Plaintiff failed to meet his burden of proof to establish a causal connection between his disability and the acts of duty. The Appellate Court affirmed that the question of whether an act of duty cause or contributed to a disability under the Pension Code is a question of fact and the Court must defer to the Board on questions of fact unless its findings are against the manifest weight of the evidence.

In evaluating Plaintiff's line-of-duty disability claim, the Court followed the well-established statutory and caselaw framework that a firefighter must establish he or she is physically or permanently disabled as the result of a sickness, accident or injury incurred in or resulting from the

performance of an act-of-duty or from the cumulative acts-of-duty defined as any act imposed on an active fireman by the ordinances of a city, or by the rules or regulations of its fire department, or any act performed by an active fireman while on-duty, having for its direct purpose the saving of life or property of another person. A firefighter need not prove that a duty-related accident is the sole cause, or even the primary cause in order to obtain a line-of-duty disability pension. Rather, a line-of-duty disability pension may be based upon the duty-related aggravation of a claimant's preexisting condition if a sufficient nexus between the injury and the duty exists.

The Court found the reports of Drs. Shaw and Reff concluded the training exercises in question did not cause or exacerbate Plaintiff's underlying anxiety disorder. Rather, there was evidence Plaintiff's condition predated his employment and the manifestation of the predisposition only became evident during the training exercises and was not caused by it. In short, the anxiety symptoms Plaintiff experienced during training were merely the manifestation of his underlying, preexisting condition and not caused by the job.

In conclusion, the Court held the Board properly denied Plaintiff's line-of-duty disability pension based on ample, competent evidence Plaintiff's inability to perform full and unrestricted duty was neither caused or exacerbated by training exercises and the denial was not against the manifest weight of the evidence.

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## *First District Upholds PSEBA Benefits For Skokie Firefighter*

*Cronin v. Village of Skokie*, 2019 IL App (1st) 181163

The First District Appellate Court affirms the award of health insurance benefits to a Skokie Firefighter under section 10 of the Public Safety Employee Benefits Act ("PSEBA"). *Cronin v. Village of Skokie*, 2019 IL App (1st) 181163. Cronin, a 30-year veteran firefighter and emergency medical technician, responded to a cardiac arrest. Cronin was holding up the stretcher when paramedics "kind of dropped" the patient onto the stretcher. Consequently, Cronin experienced pain and "thought he pulled a muscle in his chest."

Subsequently, Cronin's symptoms worsened, and he was transported to the emergency room by ambulance. Following heart surgery, Cronin's symptoms persisted. Cronin testified, "I continue to experience chest pain, dizzy spells, fatigue and [am] unable to perform physically what I had been able prior to surgery." As a result, Cronin applied for an occupational disease disability pension.

The Board of Trustees of the Skokie Firefighters' Pension Fund convened a hearing, and *sua sponte*, granted Cronin a line-of-duty disability pension. On March 18, 2014, Cronin filed his application for benefits under PSEBA. Following the filing of his application, the Village denied Cronin's application because "it was unbale to determine that [he] [was] entitled to free health insurance benefits under the [Act]." Cronin filed a complaint in the Circuit Court of Cook County seeking relief. In January 2017, the parties filed cross-motions for summary judgment. The Circuit Court granted Cronin's motion, finding, the award of a line-of-duty disability established, as a matter of law, Cronin was catastrophically injured. In considering the second prong of PSEBA (10(b)), the court also concluded Cronin responded to an emergency, and as such, was entitled to PSEBA benefits.

On August 11, 2017, the Village filed a motion for reconsideration. The Circuit Court, again, concluded there was "no issue of material fact that the symptoms Cronin experienced, such as chest pain, fatigue and dizziness were a clear consequence and effect of his response to what he reasonably believed to be an emergency and occurred because of his response to the Incident." On June 1, 2018, the Village filed its notice of appeal to strip Cronin of his health benefits. The Village offered two arguments in support of its position: (1) Cronin did not request a line-of-duty disability pension, but rather, an occupational disease disability pension; and (2) it is

"problematic" for the Village to be bound to the pension board's award because it did not have "notice" Cronin might receive a line-of-duty pension.

The Appellate Court rejected both of the Village's arguments. The court concluded, consistent with *Heelan*, 2015 IL 118170, "Our supreme court, however, was very clear that it is the *'award'* of a line-of-duty disability pension that establishes a catastrophic injury as a matter of law." (Emphasis in original). Furthermore, quoting *Heelan*, the Court wrote, "To the extent that the Village's inability to litigate at [the defendant's] disability pension proceeding refers to his catastrophic injury as provided in section 10(a) of the Act, the enactment of the statute itself afforded the Village all of the process that it was due." In short, "this case does not present some kind of unusual exception to *Heelan* . . . ."

The Village then attempted to dispute Cronin's ability to meet the requirements of section 10(b) – namely, Cronin's catastrophic injury did not occur as the result of his response to the cardiac arrest call. Instead, the Village placed great weight on the phrase "occurred as the result of" Cronin's pre-existing condition.

The Court noted, "The Village offered absolutely no evidence that any other work-related incident could be the basis for Mr. Cronin's award of a line-of-duty disability pension. The causal connection between this incident and Mr. Cronin's catastrophic injury was established as a matter of law by his being awarded a line-of-duty disability pension." Concerning the 10(b) factors, the Court concluded, the Village presented "absolutely no evidence to dispute [Cronin's] evidence that he met the criteria of section 10(b) . . . ." The Court found, "our supreme court has recognized that in some cases an employee's entitlement to both a line-of-duty pension and to benefits under [PSEBA] will be the result of work stresses on a preexisting condition."

Finally, the Court highlighted, "As both *Heelan* and this decision make clear, a municipality remains free to dispute whether the line-of-duty activity that caused the catastrophic injury meets on of the four specified criteria in section 10(b)." Nonetheless, Cronin presented "uncontradicted evidence he reasonably believed he was responding to an emergency."

Accordingly, the Appellate Court affirmed the Circuit Court's finding Cronin is entitled to benefits under PSEBA, meeting the requirements of both 10(a) and 10(b) of the Act. ❖

## ***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.

## REIMER & DOBROVOLNY PC News

- April 11, 2019, RD partner Brian LaBardi presented at the Illinois Government Finance Officers Association public pension seminar in Naperville.
- April 29-May 3, 2019, RD attorneys attended and presented at the IPPFA Spring Conference in East Peoria.
- May 3, 2019, RD partner Brian LaBardi and attorney Mark McQueary presented at the IPFA Spring Conference in Addison.
- July 28-30, 2019, RD partner Rick Reimer will attend the IPPFA Roundtable retreat in Chicago.
- August 29 and September 19, 2019, RD partner Rick Reimer will teach the IPPFA certificated trustee training at the NIU Naperville campus.
- October 1-4, 2019, RD attorneys will attend and present at the IPPFA MidAmerican Pension Conference in Lake Geneva, Wisconsin.
- November 1, 2019, RD partner Brian LaBardi will attend and present at the IPFA Fall Seminar in Addison.

***Legal and Legislative Update***

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