Volume 18, Issue 3, July 2020

Legal and Legislative Update

Amendments to the Open Meetings Act Allowing for Remote Attendance

P.A. 101-640

Due to the ongoing Coronavirus pandemic, the last several months have seen a series of adjustments to the Open Meetings Act. These modifications began with Governor Pritzker issuing successive Executive Orders and cumulated with a permanent amendment to the Open Meetings Act effective June 12, 2020.

Under the Act as amended, a public body may hold meetings via phone, video, or other electronic attendance 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 meeting 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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On June 26, 2020, the Governor issued his most recent disaster declaration. Most significantly, the disaster declaration finds, "in person attendance of more than fifty people at the regular meeting location not feasible." In conjunction with the updated disaster declaration, Executive Order 2020-43 finds, "Indoor venues and meeting spaces can operate with the lesser of fifty attendees or fifty percent of room capacity." However, it is unclear whether the fifty percent requirement applies to public bodies inasmuch as the order also exempts most local governmental bodies. Finally, Executive Order 2020-44 suggests public bodies, "are encouraged to ensure that at least one member is physically present at the location of the meeting if others are attending telephonically or electronically." Public bodies exercising a telephonic or electronic attendance option must provide notice and allow members of the public to monitor the meeting. The updated disaster declaration and Executive Orders **expire on July 26, 2020**.

What does this mean for upcoming third quarter pension board meetings or hearings? Boards continue to have the option of phone/video conference meetings in lieu of an in-person meeting. Pension boards wishing to have in-person meetings must ensure less than fifty people will be present. The Governor's orders continue to require face coverings and 6 foot distancing in public places.

Pension boards wishing to hold remote attendance meetings may continue to hold meetings via phone/video conference. In order to do so, an agenda/notice must be posted announcing the meeting will be held remotely and giving the public remote attendance options. The pension board president must make a finding an in-person meeting is not practical or prudent due to the pandemic. At least one member of the pension board must be present at the regular meeting location unless not feasible.

We will continue to issue updates as developments warrant. Gubernatorial disaster declarations and executive orders are valid for 30 days. As a result, the Governor has been issuing them in 30 days successive increments. As such, I would expect a new declaration/executive order to be issued at the end of July. Stay tuned for further developments.❖

Appellate Court Signals Departure of Sole Causation Theory for Mental Disability Claims of Police Officers

Nelson v. Retirement Bd. of the Policemen's Annuity and Benefit Fund of Chicago, 2020 IL App (1st) 192032-U

The First District Appellate Court reversed the decision of the pension board ("Board") and circuit court granting an ordinary disability benefit where officer-plaintiff developed PTSD following her response to an armed robbery call. The Appellate Court ordered plaintiff be awarded a line-of-duty disability benefit.

By way of background, plaintiff applied for a line-of-duty disability benefit after she was no longer able to work following an incident where she responded to an armed robbery. On December 8, 2016, plaintiff was assigned to a patrol car and responded to a "possible kidnapping of a FedEx driver." Eventually, the call was amended to an "armed robbery" of a FedEx driver. Plaintiff was nearby and responded to the call. After locating the FedEx truck, plaintiff called dispatch three to four times; however, her dispatcher never responded. Plaintiff testified, "I just didn't know what was going on" and said she "felt abandoned during a heightened sense of danger."

Plaintiff returned to work the following day, and, as she passed the area of the robbery on patrol, she "experienced nausea" and "tightness in [her] chest." Subsequently, she was taken to the hospital and never returned to full duty.

Plaintiff underwent a course of therapy following the incident and was prescribed Lexapro (an antidepressant) daily. Plaintiff applied for a duty disability based upon her inability to return to full, unrestricted duty.

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Following her application, plaintiff was evaluated by a plethora of physicians. The record demonstrates plaintiff had long standing psychological issues. After a hearing before the board, she was awarded an ordinary disability, not a duty disability. In its written decisionn the board noted, "[A]t no point in time ever came upon the alleged offender. Rather, the only individual [she] had [an] interaction with during the incident was the FedEx employee. As such, [plaintiff] was not, as she claims, in any real or reasonably perceived danger during the incident, and therefore was not involved in any act of police duty inherently involving special risk."

Because of [plaintiff's] repeated issues with coworkers, the board finally concluded that her "disabling condition is not the result of an identifiable act of duty incident" but rather: "is a result of her perceived unconfirmed mishandling by the [Department] of the events surrounding the December 8, 2016, incident, which was further exasperated by her longstanding and documented history of issues with emotional and psychological distress associated with her perception and conjecture of how she was being treated and viewed by others within the [Department]."

With respect to her award of an ordinary disability benefit, rather than a duty disability benefit, the board specifically stated: "[Plaintiff's] medical condition is disabling which entitles her to a disability benefit. The board further finds that [Plaintiff], by her self-serving testimony, has not met her burden of proving her disability is the result of an identifiable act of duty incident, but rather is the result of a long-standing and continuing issue concerning her perception of the [Department]'s failure to respond in a manner she feels is appropriate and how others within the [Department] view her. [Plaintiff's] application for a duty disability benefit is therefore denied, and [Plaintiff] is granted an ordinary disability benefit[.]"

Plaintiff filed a complaint for administrative review of the Board's decision in the circuit court and, on July 15, 2019, the circuit court affirmed the Board's decision. Plaintiff filed a motion to reconsider the Court's ruling, arguing, for the first time, the administrative record was incomplete because it did not include an arbitration award from April 30, 2018. The arbitration was filed by the Fraternal Order of Police on behalf of Plaintiff.

The filing asserted Plaintiff should be granted an "injury on duty" disability, which the Chicago Committee on Finance originally denied her. The arbitrator found Plaintiff's "injury arose out of her employment as a police officer" and ordered the Department to certify [her] injury as an 'injury on duty'" for the purpose of granting her disability income. The Circuit Court denied the motion to reconsider on September 11, 2019.

On Appeal, Plaintiff argued (1) the Board was bound by the arbitration award, and (2) the Board erred in only awarding an ordinary disability benefit.

The Court concluded the Board is not bound by the arbitration award. Without addressing the merits of this claim, the Court held the argument was never raised before the Board, accordingly, it will not be considered for the first time on administrative review. Further, the issue was raised for the first time in a motion for reconsideration. As such, Plaintiff forfeited any collateral estoppel argument.

Turning to the merits of the disability claim, the Court held Plaintiff's injury was in the performance of an act of duty. Moreover, the mere fact Plaintiff may have been particularly susceptible to PTSD "does not change the fact that the cause of her condition was the events of December 8, 2016." An entitlement to a duty disability turns on "whether the officer's injury leading to a disability occurred during an "act of duty" as defined under section 5-113 of the Pension Code." Plaintiff's disability was linked to an identifiable incident that a civilian would not experience, namely, responding to a report of an armed robbery.

Pension boards should take note of a possible shift in how courts are evaluating mental disability claims for police officers. The First District seems to be signaling a departure from the recent *Prawdzik* decision. There, the Third District

Appellate Court held a police officer's disability must "entirely" come from a specific, identifiable act of duty. Here, the Court appears to suggest the "act of duty" need not be the sole or exclusive cause, even in mental disability matters for police officers.❖

2016 Legislation Conflicting with the Pension Protection Clause Held Unconstitutional

2020 IL 125330

In Williamson County Board of Commissioners v. Board of Trustees of the IMRF, the Illinois Supreme Court held amendments in 2016 to the Illinois Pension Code (section 40 ILCS 5/7-137.2(a)), unconstitutional under the Illinois Constitution's pension protection clause article XIII, section 5, of the Illinois Constitution (Ill. Const. 1970, art. XIII, § 5).

The Pension Code initially allowed elected county board members to take part in the Illinois Municipal Retirement Fund (IMRF) if the participant occupied a position requiring 1000 hours of service annually, and the public employee filed an election to participate. The 1968 administrative rule necessitated the governing body of a participating employer to adopt a resolution certifying the position of elected governing body members required the hourly standard. Williamson County and the board members complied with the 1968 rule. The board members satisfied the original requirements for IMRF participation, electing to participate in 2004, 2008, and 2012.

In 2016, Public Act 99-900, amended parts of the Pension Code (40 ILCS 5/7-137.2(a)), requiring, for the first time, all county boards certify within 90 days of each general election their board members had to work sufficient hours to meet the hourly standard for participation and that members who take part in IMRF submit monthly timesheets. IMRF issued "Special Memorandum #334" to the authorized agent in every county, explaining the change: "If the County Board fails to adopt the required IMRF participation resolution within 90 days after an election, the entire Board will become ineligible and IMRF participation will **end** for those Board members." (emphasis added). The Fund also sent a direct mailing to individual county board members participating in IMRF. Subsequently, one of the board members were re-elected, triggering the new requirement in §7-137.2(a) to adopt a resolution with the new provisions in the statute. However, the Williamson County Board did not timely adopt the required resolution.

Even though the County Board adopted the resolution seventeen (17) days late, IMRF notified the plaintiffs they were not eligible for continued IMRF participation. The board members appealed to IMRF, and at the hearing, they argued Public Act 99-900 was unconstitutional under the pension protection clause. IMRF issued a decision and order terminating the board members' benefits but failing to address the constitutional argument. In 2019, board members again made this argument at Administrative Review, and the circuit court issued a judgment in favor of the board members holding Public Act 99-900 unconstitutional, directing IMRF to reinstate the board members with "full rights, membership, and participation."

IMRF appealed directly to the Illinois Supreme Court according to Rule 302 (a), and the sole issue before the Court was whether §7-137.2(a) of the Pension Code violates the pension protection clause. The Court cited the well-developed case law regarding the pension protection clause holding, "the original requirements for the [board member's] IMRF participation cannot be changed unilaterally by the legislature." The Court emphasized the "newly created requirement in the Pension Code [§7-137.2(a)] did not exist when [the board members] began their employment and participation in IMRF. Thus, it cannot be constitutionally applied to [these board members]."

Since a public employee's membership in a pension system is an enforceable contractual relationship, the Court protected continued IMRF participation from unilateral legislative diminishment or impairment when the board members became IMRF participants and accrued

the service credits. Ultimately, the Illinois Supreme Court affirmed the circuit court's judgment and found §7-137.2 of the Pension Code invalid under the pension protection clause.❖

Pension Protection Clause Protects Beneficiary from Later Code Changes

Piccioli v. Board of Trustees of Teachers' Retirement System, 2019 IL 122905 (2019)

In *Piccioli*, the Illinois Supreme Court reviewed the constitutionality of a 2007 statutory amendment that permitted teacher union employees, who became certified teachers prior to the enactment of the statute, to establish credible service in the Teachers Retirement System ("TRS") by applying in writing to the TRS within 6 months of the effective date and paying into the system both the employee and employer contributions plus interest for prior union service.

Piccioli, a union lobbyist who obtained a substitute teaching certificate in 2007 and worked one day as a substitute teacher prior to the statute's enactment, took advantage of the amendment's benefits and purchased ten (10) years of service credit.

In 2011, the Chicago Tribune published an article naming Piccioli and criticizing the amendment that allowed him to become a member of the TRS eligible for a teacher's pension. In response, the legislature enacted a law in 2012 which repealed the 2007 amendment, forced a refund of Piccioli's contributions and eliminated his service credit.

Piccioli sought injunctive relief in circuit court arguing the repeal of the 2007 amendment violated the pension protection clause. The circuit court entered summary judgment for the defendant. Piccioli appealed directly to the Supreme Court.

At the Supreme Court, the Defendant argued the 2007 amendment was special legislation expressly prohibited by the State Constitution. The Constitution's special legislation clause prevents the legislature from making classifications that arbitrarily discriminate in favor of a select group. To determine whether a law constitutes special legislation, courts apply a two-part test. First, courts must decide whether the statutory classification discriminates in favor of a select group and against a similarly situated group. Next, if the classification does discriminate, courts must decide whether the classification is arbitrary. To determine whether a classification is arbitrary, courts apply the rationale basis test. Under the rational basis test, courts hypothesize reasons for the legislation, even if the reasoning advanced was not contemplated by the legislature.

Here, the Court analyzed whether the statutory classification discriminated for or against a select group and found the amendment discriminated in favor of employees who began working for the statewide teacher's union prior to the amendment. Next, the Court weighed whether the classification was arbitrary. The Defendant argued the cutoff date was arbitrary, thus rendering the amendment unconstitutional. The Court held the inclusion of a cutoff date in a statute that confers government benefits reliant on public funding is rational as state and local governments operate with limited resources and budgets and as such, limiting benefits to a finite number of participants is both reasonable and necessary (i.e. Tier 1 v Tier 2). Further, the Court found there is no constitutional requirement a government program must continue in perpetuity. As such, the Court found a rational basis for the amendment and determined it was not special legislation.

Next, the Defendant argued numerous union employees were unaware of the amendment. The Court held ignorance of the law had no bearing on whether it was special legislation and the fact other union employees did not opt in does not render the statutory benefit special legislation. Further, the Court found the amendment applied generally to all eligible employees and not a specific individual.

Finding the 2007 amendment was not special legislation, the Court held the amendment conferred a pension benefit protected by the Pension Protection Clause. By following the amendment's provisions, Piccioli established an

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enforceable contractual relationship. While nothing prevented the legislature from eliminating this benefit for future employees, there was no justification for reducing or eliminating the pension benefits Piccioli was awarded by the 2007 amendment.

The takeaway: Once a person commences to work and becomes a member of a public retirement system, any subsequent changes to Pension Code that would diminish the benefits conferred by membership in the retirement system cannot be applied to that person. Hence, once Tier 1, always Tier 1.❖

Supreme Court Finds CPD Police Records Must Be Maintained Despite CBA Provision for Destruction

City of Chicago v. Fraternal Order of Police, Chicago Lodge 7, 2020 IL 124831

This case presents the sole issue of whether a provision in a collective bargaining agreement ("CBA") requiring destruction of disciplinary files after five years violates public policy.

This case had a lengthy procedural history. Since January 1981, the City of Chicago ("City") and Fraternal Order of Police, Chicago Lodge 7 ("FOP") were parties to a CBA, including §8.4, mandating the destruction of disciplinary investigation records, such as complaint register files prepared by COPA and Chicago Police Department ("CPD") Internal Affairs Division involving allegations of alleged misconduct by members of the CPD. The provisions of §8.4 have remained substantially unchanged since the 1981 CBA, despite numerous attempts by the City to eliminate or modify the provision. Section 8.4 requires destruction of those records after "five years from the date of incident or the date upon which the violation is discovered, whichever is longer."
In 2011 and 2012 FOP filed two grievances over the City's failure to destroy complaint register files in extending beyond the five year period. In October 2014, the City notified FOP it intended to comply with FOIA request from the Chicago Tribune and Chicago Sun Times for information related to complaint register files dating back to 1967. What followed was a lengthy history of court challenges and entry of a preliminary injunction enjoining the City from releasing files more than four years old.

Enter the United States Department of Justice ("DOJ"), which opened a civil pattern and practice investigation of the CPD focusing on allegations of excessive force and discriminatory policing. DOJ sent the City a document preservation request, requesting the City and CPD preserve all existing documents "related to all complaints of misconduct against CPD officers." In January 2016, the arbitrator issued an interim award finding the City violated §8.4 of the CBA and directed the parties to attempt to negotiate a procedure for compliance. In February 2016, the DOJ sent letters to the City requiring the City to preserve all documents relating to complaints of misconduct for the duration of the pattern and practice investigation.

What followed was a series of supplemental arbitration awards and court proceedings. In October 2017, the Circuit Court granted the City's Petition to Vacate the Final Arbitration Award and denied FOP's counter petition to enforce the award, ruling enforcement of the arbitrator's award "violated a well-defined and dominant public policy to preserve government records." The FOP appealed and the Appellate Court affirmed holding the Local Records Act, the State Records Act, and FOIA established the well-defined public policy requiring retention of important public records for access to the public. FOP filed a Petition for Leave to Appeal with the Illinois Supreme Court.

The majority of the Illinois Supreme Court analyzed this case under the "public policy" exception to arbitration awards under the Illinois Public Labor Relations Act. Under the public policy exception, a Court may set aside an arbitration award if it is "repugnant to establishing norms of public policy." This exception is a narrow one and is invoked only when a party clearly shows

enforcement of the contract, as interpreted by an arbitrator, contravenes some explicit public policy.

The Court applied a two-step analysis. The first inquiry is whether a well-defined and dominant public policy can be identified through a review of the Constitution, statutes and relevant judicial opinions. If the Court is satisfied as to the existence of the well-defined and dominant public policy, the Court must then determine whether the arbitrator's award, as reflected in his interpretation of the agreement, violated public policy.

As the first step of the analysis, the Court reviewed the provisions of the Local Records Act and the State Records Act. A review of the State Records Commission's duties and responsibilities under the State Records Act persuaded the majority to conclude there is a "well-defined and dominant public policy rooted in state law concerning the procedures for the "proper retention and destruction of governmental records." In this analysis, the majority apparently did not need to consider the provisions of FOIA.

Having found a "well-defined and dominant public policy," the Court then turned to the question of whether the arbitrator's award violated that public policy by enforcing compliance with §8.4 of the CBA. The Court noted, as written §8.4 only requires disciplinary documents will be destroyed after a finite period of time. Section 8.4 does not take into consideration "whether the records do not have sufficient administrative, legal or physical value to warrant their further preservation" as required under the Local Records Act. In addition, the Court found §8.4 of the CBA did not require the parties to be bound by the decision from the records commission. Moreover, §8.4 makes no reference to any of the mandatory review procedures as set forth in the Local Records Act.

Accordingly, the majority held as follows:

"The arbitrator erred in finding that §8.4 is consistent with state law and not contrary to state public policy, thereby mandating the parties to comply with the destruction of all discipline records covered under this provision. Consequently, the award is void and not enforceable."

The Court held the arbitration award violated an explicit well-defined and dominant public policy and affirmed the judgment of the Circuit Court vacating that award, affirming the judgment of the Appellate Court.

Justice Kilbride authored a dissenting opinion. Justice Kilbride prefaced his dissent by recognizing, "the issue of police misconduct is a serious issue that must be confronted by society." Justice Kilbride seemed to weight the competing public policy of the State to enforce collective bargaining agreements and labor arbitration awards against the public policy relied upon by the majority. Justice Kilbride believes the two public policies can "coexist harmoniously and that this arbitrator's decision may be construed so as not to create a conflict between those policies."

Justice Kilbride believed the arbitrator's award simply directed the parties to negotiate the method and procedure for the possible future destruction of eligible records in compliance with §8.4 of the CBA. Justice Kilbride pointed out that the arbitrator did not mandate destruction of all records. Justice Kilbride also placed emphasis on provisions of §15 of the Illinois Public Labor Relations Act, establishing a public policy supporting collective bargaining and and the enforcement of labor arbitration awards.

Justice Kilbride concluded:

"Based upon the parties' briefs and comments during oral argument, it is readily apparent that the parties are fully aware of the requirements of the Local Records Act, other applicable statutes, and the consent decree. Thus we can safely assume that negotiations for the possible future destruction of any eligible discipline records would have been done in full compliance with the consent decree and any other requirements by law. I believe the parties should be allowed to meet and negotiate in accordance with the arbitrator's directive."❖

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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

- RD is pleased to announce it has been retained as general counsel for the Illinois Police Officers Pension Investment Fund.

Training Seminar Updates

- IPFA will be offering a four hour training course on the changes implemented by P.A. 101-0610 via remote attendance on July 2, 2020.
- The IPPFA fall conference remains set for September 30-October 2 in Naperville. Both in-person and virtual attendance will be offered. The seminar will include training required under P.A.101-0610.

Legal and Legislative Update

Volume 18, Issue 3, July 2020
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***Legal and Legislative Update* is published periodically. Questions may be directed to:**
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