



Volume 16, Issue 4, October 2018

Legal and Legislative Update

Firefighter Failed to Establish Causal Connection Between PTSD Disability and Act of Duty

Covello v. Village of Schaumburg Firefighters' Pension Fund, et al., 2018 IL App. (1st) 172350

A firefighter applied for a line of duty disability stemming from PTSD allegedly triggered by a duty related incident. The firefighter claimed his PTSD was caused, or at the least, contributed to or exacerbated by his response to an emergency scene where he found a police officer known to him in cardiac arrest. The police officer died from the cardiac event the firefighter claimed caused his disability.

In evaluating his claim for line of duty pension benefits, the Pension Board noted Covello suffered from numerous pre-existing physical and psychological conditions including anxiety and depression. It was the position of the applicant, the act of duty caused or contributed to his disability and therefore, line of duty benefits should be awarded. The Pension Board awarded not in the line of duty disability pension benefits finding the applicant failed to establish a causal connection between the act of duty and his disability. The request for line of duty disability benefits was therefore denied.

In reviewing the Pension Board's decision, the Appellate Court first found the issue of whether an act of duty caused or contributed to disability to be a question of fact subject to the manifest weight of the evidence (or most deferential) standard of review. The Court next noted well established case law holding the duty-related accident or illness need not be the primary or originating cause of disability to merit a line of duty disability. Rather, it is sufficient if the duty-related accident aggravated, contributed, or exacerbated the pre-existing condition resulting in disability.

IN THIS ISSUE

- 1** Firefighter Failed to Establish Causal Connection Between PTSD Disability and Act of Duty
 - 2** Harvey Settles Comptroller Intercept Lawsuit with Pension Funds
 - 3** DOI Issues Opinion on Police Officer Re-Entry Prohibitions
 - 3** Actuary Tim Sharpe Suspended by American Academy of Actuaries
 - 3** Suggested Agenda Items for January (or 1st Quarter)
 - 4** Legislative Changes to Firefighter PTSD Disabilities & Chief of Police IMRF Participation
 - 4** Deliberative Process Privilege Does Not Shield Assessor's Records from FOIA
 - 5** No PSEBA Benefits for School Resource Officer
 - 6** Reimer & Dobrovolny PC News Pre-Existing Conditions Affirmed
 - 6** Veteran Prosecutor Joins RD Legal Team
-

Each doctor who treated or examined the applicant found him to be disabled although there was a disagreement amongst the medical professionals as to whether any act of duty caused his disability. In this case, the applicant's treating doctor noted a decline in his condition after removal from duty he attributed to the loss of his firefighter support system. Moreover, four other doctors who offered opinions found either applicant's PTSD was not caused by the on-duty incident and/or he did not meet the full criteria for a PTSD diagnosis. The Appellate Court also noted factual testimony indicating the on-duty incident did not seem to have a profound effect on the applicant inasmuch as he did not mention it to his treating doctor until four years after the incident, completed his shift on the day in question, did not report any symptoms at the time, and continued to perform as a firefighter for sometime after the call. In short, the Appellate Court found the pension board's determination no connection between the on-duty incident and disability had been established to be supported by the administrative record.

In addition to challenging the denial of line of duty benefits, the applicant also took issue with the pension benefit effective date used by the pension board. The applicant tendered a check to the pension fund for the time he was on sick leave and not receiving a pension. In accordance with Section 4-108 of the Pension Code, this time would count as creditable service and bring his last day on payroll to December 5, 2014. Before the pension board issued its decision and order, the village advised applicant he could purchase additional creditable service through February 13, 2015. Applicant offered to purchase an additional 10 weeks of service to bring his total creditable service time up to 20 years. The pension board however, adopted the earlier December date as the effective date in its written decision and order. On appeal, applicant argued the pension board violated the Open Meetings Act because it met in closed session to consider the claim but failed to articulate in the decision and order any reasoning on why it did not adopt the February pension effective date. The Court rejected this challenge finding no authority requiring the pension board to accept the

applicant's offer to purchase additional creditable service. ❖

Harvey Settles Comptroller Intercept Lawsuit with Pension Funds

As a follow up to an article in the July newsletter, the City of Harvey has reached a settlement with both the Harvey Police and Firefighters' Pension Funds over the lawsuit stemming from the requests of both Funds the Comptroller intercept State funds destined for City coffers and divert them to the Pension Funds.

As you may recall, in the first test of a 2010 amendment to the Pension Code allowing underfunded police and fire pension funds to petition the State Comptroller to intercept monies otherwise destined for the City and divert those funds to the pension funds, both Harvey Police and Firefighters' pension funds requested monies be intercepted. When the Comptroller withheld funds from the City, the City sued. The Circuit Court of Cook County refused the City's request to release the funds. The Appellate Court ordered the monies released while the case played out but the Supreme Court vacated that order before it could take effect and remanded the case to the Circuit Court. Since that time, the parties have been engaged in negotiations in an attempt to resolve the matter.

Under the terms of the settlement agreement, the City agreed to allocate 35% of the money received from the State to the police and firefighters pension funds. Initially, the police fund will receive a greater share with the firefighters' share increasing as the police fund becomes more solvent. Pursuant to the terms of the agreement, the monies will be paid directly from the State Comptroller to the pension funds.

A third claimant in this case represented Harvey municipal bondholders. The Comptroller had initially set aside monies derived from a home rule sales tax as part of the intercept request but later released that money to bondholders finding those tax proceeds were paid for that specific debt service

and could not be attached by the intercept law. Subsequently, the City has been sued by several investment firms for defaulting on other municipal issued debt.

Inasmuch as this first ever intercept case was resolved by settlement agreement, no legal precedent arises from these proceedings. However, it is possible the settlement agreement reached in Harvey may serve as a framework for other pension funds dealing with chronic municipal underfunding. ❖

DOI Issues Opinion on Police Officer Re-Entry Prohibitions

In our October 2017 newsletter, we reported on P.A. 100-281 which created a defined contribution plan option for some police officers. That legislation also addressed re-entry into active service issues providing a police officer who first becomes a member after January 1, 2019, may continue to receive pension payments while re-entering active service for any municipality, but may only participate in the defined contribution plan option and not any Article 3 plan.

This has created potential confusion on what impact, if any, a re-entry should have for an officer who is in service prior to the date of January 1, 2019. The Department of Insurance (“DOI”) has recently issued an opinion finding an officer

receiving Article 3 benefits subsequently hired as a full time officer at another Article 3 municipality cannot elect the defined contribution plan option and, moreover, has re-entered active service pursuant to Section 124.1 of the Pension Code triggering a re-entry into active service and suspension of his retirement benefits. In making this finding, the DOI specifically opines return to active service in any municipality (as opposed to only the same municipality) qualifies as a re-entry into service and results in suspension of retirement benefits. It does note this would not have been the case if the officer were hired at the second fund after January 1, 2019. In that case, the officer would be allowed to continue to receive his retirement benefit while opting for the defined contribution plan. ❖

Actuary Tim Sharpe Suspended by American Academy of Actuaries

Actuary Tim Sharpe, who performs actuarial services for many Illinois police and firefighter pension funds, has been suspended by the American Academy of Actuaries. The discipline was issued August 20, 2018 and resulted in a two year suspension from the Academy.

Typically, Article 3 and 4 Pension Funds deal with independent actuaries in the calculation of the required tax levy and actuarial statement required to be submitted to the Department of Insurance along with its annual statement.

Suggested Agenda Items for January (or 1st Quarter)

- Approval of annual COLA increases.
- Semi-annual review of closed executive session minutes to determine if needs to remain confidential.
- Determine need for election of beneficiary and active Trustees and/or re-appointment of appointed Trustees – request for re-appointment of appointed Trustees.
- Schedule annual examinations for disabled firefighters/police officers under age 50.
- Annual verifications of eligibility for beneficiaries.
- Review/update contracts with vendors (accountants, actuaries, attorneys, investment managers/advisors or consultants).
- Obtain predatory lending certification forms from Illinois regulated banks.

Under Article 3 of the Illinois Pension Code, the annual tax levy required for the pension fund must be performed by an enrolled actuary. That term is not defined in Article 3. Article 4 of the Pension Code includes the same requirement and goes on to define “enrolled actuary” as an actuary “(1) who is a member of the Society of Actuaries or the American Academy of Actuaries and; (2) who is enrolled under Subtitle C of Title III of the Employee Retirement Income Security Act of 1974, or who has been engaged in providing actuarial services to one or more public retirement systems for a period of at least 3 years as of July 1, 1983.”

In addition to calculation of the tax levy, Article 3 and 4 pension funds must include an actuarial statement for the applicable plan year with their annual statement submitted to the Department of Insurance. The statute requires the actuarial statement be prepared by a “qualified actuary”. It goes on to define “qualified actuary” as, “(i) a member of the American Academy of Actuaries, or (ii) an individual who has demonstrated to the satisfaction of the Director that he or she has the educational background necessary for the practice of actuarial science and has at least 7 years of actuarial experience.” At the time of this writing, the Department of Insurance has not responded to requests seeking information on any individuals qualifying under option (ii) above.

To ensure continued compliance with the above statutes, pension funds should ensure any independent actuary meets the requirements set forth above. ❖

Legislative Changes to Firefighter PTSD Disabilities & Chief of Police IMRF Participation

P.A. 100-1097, effective August 26, 2018

A recent amendment to the Pension Code affects firefighter PTSD disabilities and Chief’s of Police ability to participate in IMRF.

The new Act first amends Article 4 of the Pension Code pertaining to annual examination of firefighters who are receiving disability benefits as a result of PTSD related to the disabled member’s service as a firefighter. Section 4-112 now provides annual examination for a firefighter on disability for fire service related PTSD shall not be made if: 1) the firefighter is at least 45 years old, 2) the firefighter has provided to the pension board documentation approving the discontinuance of annual medical exams from at least two physicians, and 3) at least four members of the pension board vote to allow the firefighter to discontinue the annual examination.

The Act also amends Article 7 of the Pension Code which governs IMRF. It amends Section 7-109 to exclude from the definition of “employee” any person who did not participate in IMRF prior to the effective date of the Act and participated as a chief of police in an Article 3 pension fund and returns to work in any capacity with the police department, with any oversight of the department, or in an advisory capacity for the police department with the same municipality, regardless of whether they are considered an employee of the police department or are eligible for inclusion in the Article 3 fund. ❖

Deliberative Process Privilege Does Not Shield Assessor’s Records from FOIA

Chicago Tribune Co. v. Cook Co. Assessor’s Office, 2018 IL App (1st) 170455

The Illinois Freedom of Information Act (“FOIA”) includes an exemption for, “preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed or policies or actions are formulated.” This exemption is also encompassed by the “deliberative process privilege” as interpreted under federal FOIA law. The Chicago Tribune sent a FOIA request to the Cook County Assessor seeking records pertaining to valuation of properties in Cook County for assessment purposes. The Assessor denied the

request asserting the information requested was exempt pursuant to the deliberative process privilege and preliminary draft exception. The Circuit Court disagreed and ruled in favor of the Tribune awarding it attorney's fees in accordance with the FOIA.

On appeal, the Appellate Court examined the nature of the data claimed to be exempt by the Assessor. The data requested consisted of various reports containing factual data compiled in such a way as to ultimately generate an assessed valuation for a specific property. Because these values are subject to modification during the valuation process, the Assessor claimed they constitute opinions of the employees of the office charged with setting valuations and are covered by the exemption and deliberative process privilege.

In affirming the judgment of the lower court, the Appellate Court found the data requested was final, factual data, as opposed to preliminary data in which opinions are expressed and/or policies or actions are formulated. The request did not seek the process on how the determinations are made. Rather, the Court found the Tribune sought the documents showing the decisions themselves. As such, the documents requested were not exempt from the FOIA.

In reaching this determination, the Court reviewed the case law pertaining to data requests and the deliberative process/preliminary draft exemption to the FOIA. It found documents reflecting data are not subject to the deliberative process exemption because they are not part of the predecisional deliberative process. Even if the data used is subject to subsequent revision, it remains data subject to the FOIA. "Purely factual material must be disclosed under the FOIA once a final decision has been made, unless the factual material is inextricably intertwined with predecisional and deliberative discussions." As such, a governmental body cannot withhold factual documents reflecting its final policy decisions.

In responding to FOIA requests in the pension world, this decision should help guide FOIA

officers when dealing with requests for actuary studies, financial information, annual DOI reports, and any request seeking what could be construed as factual data. That information is likely not exempt from FOIA under the preliminary draft/deliberative process privilege especially if a final determination has been made by the public body. ❖

No PSEBA Benefits for School Resource Officer

Stimeling v. Peoria Public School Dist. 150, 2018 IL App (3d) 170567

Plaintiff in this matter was employed as a "school resource officer" by Defendant, Peoria Public School District. When he was injured on the job after being attacked by a student, he was put on desk duty where he worked for a period of two years. At that time, the District terminated him. Plaintiff filed suit seeking benefits under the Public Employee Disability Act (PEDA) and Public Safety Employee Benefits Act (PSEBA). At issue for both claims, was whether Plaintiff, in his capacity as a "school resource officer" was employed as a "law enforcement officer" putting him under the umbrella of both Acts.

Even though he was employed by the School District, Plaintiff argued he met the definition of a "law enforcement officer" because the District trained him as such an officer and had the authority to hire law enforcement officers under the School Code. In rejecting these arguments, the Appellate Court found the School District does not have the authority to hire law enforcement officers and no training provided by the District can turn Plaintiff into a law enforcement officer within the meaning of PEDA or PSEBA. While the School District has the authority to hire truant officers, those officers do not have the authority to investigate nontruancy crimes, issue traffic citations or adhere to any specific training requirements. While PSEBA and PEDA specifically cover law enforcement officers employed by State supported colleges and universities, the Court found it cannot be read to expand to School Districts and they do not have the

power to employ law enforcement officers. As such, Plaintiff's employment as a school resource

officer for the District did not entitled him to benefits under PEDA or PSEBA. ❖

REIMER & DOBROVOLNY PC News

- July 30-31, 2018, RD partner Rick Reimer attended the IPPFA National Roundtable Conference at the Abbey Resort in Fontana, Wisconsin.
- August 16, 2018, RD partner Rick Reimer taught at the IPPFA certified trustee training seminar in Hoffman Estates.
- September 12, 2018, RD partner Rick Reimer taught at FBINAA Railsplitters annual training seminar on officer involved shootings.
- September 13, 2018, RD partner Rick Reimer taught at the IPPFA certified trustee training seminar in Hoffman Estates.
- October 2-5, 2018, RD attorneys will present at and attend the IPPFA Fall Conference in Lake Geneva, Wisconsin.
- October 29-30, November 1, 8, 2018, RD partner Rick Reimer will teach at the IPPFA certified trustee training seminar in Hoffman Estates.
- November 2, 2018, RD partner Brian LaBardi will present at the IPFA Fall Conference in Addison.
- November 14-16, 2018, RD partner Rick Reimer and attorney Mark McQueary will attend the National Association of Police Organizations conference in Las Vegas, Nevada.

Veteran Prosecutor Joins RD Legal Team

Steven Knight is a senior associate with the law firm of Reimer & Dobrovoly PC. Mr. Knight concentrates his practice in the areas of public sector labor law, constitutional rights of public employees, public safety pension law, and criminal defense of police officers charged with on duty criminal misconduct.

Prior to joining Reimer & Dobrovoly, Steven Knight was an assistant state's attorney in DuPage County for over 23 years. During his career as a prosecutor, he tried 85 jury trials, of which 67 were felony prosecutions. He tried to verdict a total of 16 prosecutions for first degree murder. He successfully obtained two guilty jury verdicts resulting in the offenders receiving natural life sentences. Prior to the abolishment of the death penalty in the State of Illinois, he was admitted to the Capital Litigation Trial Bar and was authorized and certified to appear as Lead Counsel in capital cases. He also served as the legal liaison to the DuPage County Fire Investigations Task Force and the DuPage County Major Crimes Task Force, responding to officer involved shootings.

He ended his career as Deputy Chief of the Criminal Prosecutions Bureau after serving almost 10 years as Supervisor of the Gang Crime Unit. He also served as a supervisor of a felony trial courtroom and was a prosecutor specially assigned to the Narcotics Unit.

Steven also lectured and taught at the National District Attorney's Association, University of Illinois – Police Training Institute, University of Illinois – Fire Service Institute, Downers Grove Fire Academy and College of DuPage – Fire Science Technology.

Steven received his undergraduate degree from Marquette University and his law degree from DePaul University College of Law. He is licensed to practice in the State of Illinois and before both the United States District Court for the Northern District of Illinois and the United States Supreme Court. He is a member of the Illinois Prosecutors Bar Association and the DuPage County Bar Association, and IPPFA 32 Hour New Trustee Certification Course.

Legal and Legislative Update

Volume 16, Issue 4, October 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

Unauthorized reproduction prohibited. All rights reserved.