



Volume 18, Issue 4, October 2019

## Legal and Legislative Update

### ***Appellate Court Affirms Pension Board's Denial of Surviving Spouse's Claim for "Act of Duty" Death Benefit***

*Gatz v. Board of Trustees of the Village of Maywood Police Pension Fund*, 2019 IL App (1st) 190556

In *Gatz v. Board of Trustees of the Village of Maywood Police Pension Fund*, 2019 IL App (1st) 190556, the First District Appellate Court affirmed the Pension Board's decision, denying the claim for surviving spouse pension benefits pursuant to §3-112(e) of the Illinois Pension Code. The Court unanimously concluded the Pension Board's decision was not against the manifest weight of the evidence and sufficient evidence supported the Board's finding the death was not the result of sickness, accident, or injury incurred in or resulting from the performance of an "act of duty."

To obtain a line-of-duty pension under §3-112(e), Plaintiff was required to prove: (1) he or she is the surviving spouse of a police officer who died on or after January 1, 2001; (2) without having begun to receive either a retirement pension or a disability pension; and (3) the death of the police officer was the result of sickness, accident, or injury incurred in or resulting from the performance of an act of duty.

Here, Plaintiff's spouse died at his home in July 2016. A death investigation revealed he had numerous prescription drugs in his system, coupled with a history of drug and alcohol abuse, cardiovascular disease, and obesity. No suicide note was found. Plaintiff claimed her husband relapsed as a result of his involvement in an October 2014 shooting which resulted in post-traumatic stress disorder ("PTSD"). Plaintiff further argued the PTSD caused her spouse to abuse prescription drugs which ultimately led to his death, and thus satisfied her burden to prove an "act of duty" was a cause of death. Plaintiff alleged two doctors determined her spouse's death was the result of PTSD from a 2014 shooting incident, which directly led to drug abuse and resulted in his death.

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As a threshold matter, The Court agreed Plaintiff was not required to prove an “act of duty” was the sole or primary cause of death. Instead, Plaintiff was only required to prove the “act of duty” was a contributing cause of death. The Pension Board found, and the Court agreed, the medical opinions asserted by Plaintiff were “less persuasive” than other evidence, including the medical examiner’s finding the death was accidental and the result of multiple medical causes. The Court held Plaintiff’s experts “failed to discuss or refute the conclusion contained in the Medical Examiner’s Report of Postmortem Examination.” Furthermore, the Court also concluded the other physician cited by Plaintiff “admitted that it could not be completely ruled out that Ryan died from medical causes related to his pre-existing conditions of hypertension, cardiomegaly, and cardiomyopathy...”

Contrary to Plaintiff’s assertion, the Board did not rely solely on the report of one physician. Rather, in reaching its conclusion, the Board relied on two physician reports and record evidence indicating the narcotic medication, hydrocodone and hydromorphone, which was found in the decedent’s system at the time of his death, was prescribed for the chronic pain following shoulder surgery. In addition, Plaintiff admitted her spouse had been taking excessive amounts of pain medication. The Court found, “There is no evidence that [decedent] was taking pain medication as a result of the October 25, 2014 on-duty incident. The Board could reasonably have found that [decedent’s] excessive use of narcotic pain medication was attributable to the pain he was suffering as a result of his non-duty related shoulder surgery. In addition, [decedent] had a history of mental health treatment and addiction before October 25, 2014.”

As such, the Appellate Court concluded the Pension Board’s decision denying Plaintiff a surviving spouse pension under Section 3-112(e) was not against the manifest weight of the evidence and affirmed the judgment of the Board and Circuit Court. ❖

## **“Ongoing Criminal Investigation” FOIA Exemption Doesn’t Equal Blanket Exemption to FOIA Request**

*Kelly v. Village of Kenilworth, et al.*, 2019 IL App (1st) 170780

In *Kelly v. Village of Kenilworth, et al.*, 2019 IL App (1st) 170780, the First District Illinois Appellate Court considered the appeal of a FOIA request denial for records relating to a 50-year-old murder investigation. In 1966, 21 year old Valerie Percy was violently murdered at her home in the Village of Kenilworth. At the time of Percy’s murder, Kenilworth Police Department (“Kenilworth”) and surrounding areas lacked a major crimes task force. Kenilworth initially pursued the investigation with the assistance of local officers and the Illinois State Police (“ISP”) before the case was officially turned over to ISP. ISP’s investigation of Percy’s murder continued for decades with the assistance of the Chicago Police Department (“CPD”), Federal Bureau of Investigation (“FBI”), Cook County Medical Examiner (“CCME”) and Cook County State’s Attorney’s Office (“CCSAO”) until 2002 when it was turned back over to Kenilworth. In 2014, the North Regional Major Crimes Task Force/Percy Homicide Task Force, which included Kenilworth and surrounding towns, was created and tasked with the investigation.

In 2016, as the 50th anniversary of Percy’s murder approached, Plaintiff John Q. Kelly (“Kelly”), a former New York prosecutor and criminal defense attorney, filed requests under the Illinois Freedom of Information Act (“FOIA”) with Kenilworth, ISP, CCSAO, CCME and CPD seeking all records pertaining to Percy’s murder investigation.

Kenilworth denied Kelly’s request in its entirety citing FOIA Section 7(1)(d)(vii). Kenilworth responded the requested records were created for law enforcement purposes and disclosure would obstruct or interfere with their active or ongoing criminal investigation. FOIA Section 7(1)(d)(vii) permits a public body to withhold information if disclosure would obstruct an ongoing criminal investigation by the agency that is the recipient of

the request. The CCSAO also denied the request pursuant to FOIA Sections 7(1)(d)(vii) and 7(1)(d)(i). FOIA Section 7(1)(d)(i) permits a public body to withhold records that would interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by the law enforcement agency that received the FOIA request. ISP denied Kelly's request determining the requested information would interfere with a pending or reasonably contemplated law enforcement proceeding. The CCME never responded. None of the public bodies cited the "unduly burdensome" exemption under FOIA Section 3(g) as the basis for denial.

Kelly filed a complaint against the public bodies citing willful and intentional FOIA violations for failing to produce records responsive to his request. Kelly moved for partial summary judgment against Kenilworth, ISP, and CCSAO arguing the public bodies had the burden of proving the requested records were exempt. Kelly further argued ISP and CCSAO were not conducting any investigation and could not rely on Kenilworth's investigation to claim an exemption.

Kenilworth Police Chief David Miller argued disclosing any portion of Kenilworth's file would jeopardize the ongoing investigation. Chief Miller further argued the codefendants should also be permitted to withhold records because they were assisting in the investigation. Kelly responded Kenilworth could not assert an exemption over other defendants and had not shown the disclosure of specific records would interfere with the allegedly ongoing investigation. ISP argued agencies do not work in a vacuum and releasing ISP's records could interfere with an ongoing criminal investigation, even if ISP was not presently leading the investigation. ISP submitted affidavits showing ISP's recent involvement with the investigation. CCSAO argued the records were exempt under 7(1)(d)(vii) because the documents are the product of the joint efforts of several law enforcement agencies and the investigation is ongoing and active.

The Circuit Court opined (1) Kenilworth's investigation was active and ongoing and its files were exempt under section 7(1)(d)(vii); (2) due to

cooperation among the public bodies, Kenilworth's exemptions flowed to its codefendants; (3) the ISP investigation was active and ongoing and its files were exempt under sections 7(1)(d)(i) and 7(1)(d)(vii); (4) the CCSAO's investigation was active and ongoing and its files were exempt under section 7(1)(d)(vii); (5) Kenilworth was entitled to assert an exemption over the CCME files in which it had a substantial interest; and (6) Kelly's motion for partial summary judgment as to CCME was granted in part and denied in part. After examining the filed affidavits and reviewing in camera more than 1000 pages, the Court found that detailed justifications supported each claimed exemption.

On appeal, the Appellate Court noted Illinois policy dictates, "all persons are entitled to full and completed information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with terms of this act." 5 ILCS 140/1 (West 2016). Access to this information is necessary to allow people to monitor the government and promote transparency and accountability. Consequently, FOIA provisions are to be construed according to that principle of access with limited exceptions. All records are presumed open to inspection and a public body asserting an exemption has the burden of proving that exemption by clear and convincing evidence. A public body may meet this burden through affidavits, in which the case the court need not review the documents at issue in camera. Affidavits are insufficient if the public body presents claims that are conclusory, overly vague or sweeping, or merely recite statutory standards. Discovery pertaining to the public body's search for records and its claimed exemption is not required if the public body's submission is adequate on its face. In such case, circuit courts can forgo discovery and enter summary judgment based on the affidavits once the documents at issue are properly identified.

Regarding the claimed 7(1)(d)(vii) exemption, the Appellate Court held police agencies must prove on a case-by-case basis specifically how an individual investigation could be compromised if a document is disclosed in which all identifying information has been redacted. The Appellate Court further held that one public body (Kenilworth) may assert the

exemption over another public body's (codefendants) records. Illinois law and practical necessity requires law enforcement agencies cooperate with one another to investigate and prosecute crimes. If one public body was not permitted to assert the exemption over another public body's records, law enforcement agencies would be discouraged from cooperating due to the risk of harmful disclosures, thus denying effective law enforcement.

However, the Appellate Court found the method used by defendants to address the voluminous investigative files did not comport with Illinois law. Section 7(1)(d) does not itself authorize a blanket exemption; rather, it states that the public body shall make information available for inspection and copying after all exempt information has been redacted from those documents. This duty remains even if the remaining material is not useful.

FOIA Section 3(g) provides an exemption where "the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information." To assert the 3(g) exemption, the public body bears the burden of proving, by clear and convincing evidence, that (1) the request would require the public body to locate, review and redact vast material that is largely unnecessary to the requestor's purpose, and (2) that the public body first extended to the requestor an opportunity to confer with it in an attempt to reduce the request to manageable portions.

Here, the public bodies failed to cite or comply with section 3(g). While the Appellate Court found backdoor such an exemption denied Kelly meaningful notice the public bodies intended to evade any obligation to redact, the Court remanded the case to allow the public bodies the opportunity to establish a 3(g) exemption or make the extensive redactions required by section 7(1)(d). ❖

## ***New Changes to the Exemption Section 7 of the Freedom of Information Act (FOIA): Addition of part (kk)***

P.A. 101-0434

The Legislature passed SB1712 on August 20, 2019. The bill was sent to the governor and signed into law. The law is scheduled to go into effect on January 1, 2020. According to the General Assembly website, the bill as introduced was designed to exempt information "... disclosure of which could result in identity theft or impression or defrauding of a governmental entity or a person."

The new addition of the law, (kk) to Section 7, amends the Freedom of Information Act by increasing exemptions from disclosure a "public body's credit card numbers, debit card numbers, bank account numbers, Federal Employer Identification Number, security code numbers, passwords, and similar account information, the disclosure of which could result in identity theft or impression or defrauding of a governmental entity or a person." ❖

## ***Firefighter Secondary Employment Reporting Bill Passed***

P.A. 101-0522

The Legislature has passed Senate Bill 37 pertaining to secondary employment for firefighters. While initial versions of the bill contemplated a secondary employer making monetary contributions to the firefighter's primary pension fund, the bill passed contemplates only additional reporting requirements.

The Act amends Sections 4-110.2 and 4-118 of the Pension Code. It defines a "primary employer" as a municipality (or fire district in most cases) having established an Article 4 pension fund and employing the full time firefighter at issue. "Secondary employer" means a municipality of 5,000 or more that employs the firefighter while he

continues to earn service credit as a participant in the primary employer's Article 4 pension fund.

The fire chief of a secondary employer must report "any injury, illness, or exposure" incurred by a secondary employee during employment to the primary employer's pension fund within 96 hours of the occurrence.

In addition, the secondary employer must annually prepare a report of all hours worked and wages and salaries paid to the secondary employee firefighter. The secondary employer must transmit a certified copy of the report to the primary employer's pension fund and the secondary employee firefighter no later than 30 days after close of fiscal year.

In short, the bill creates a number of new reporting requirements for fire chiefs, municipalities, and fire districts but does not require Article 4 pension funds to perform any new act. However, firefighter pension funds will now be the recipient of these additional reports. ❖

### ***Comptroller Intercept Claim Made For East St. Louis Fire***

The East St. Louis Firefighters' Pension Board has made an intercept claim with the Illinois Comptroller's Office seeking to have approximately \$2.2 million diverted to the Pension Fund. The Pension Board held a hearing prior to submission of its intercept claim at which the City did not dispute the delinquent amount due the Pension Fund.

In its claim to the Comptroller, the Pension Fund noted the City failed to provide the minimum funding required under the statute for fiscal years 2017 and 2018. According to Department of Insurance report, as of January 1, 2018, the Firefighters' Pension Fund is only 11% funded. The claim was submitted September 17. The Comptroller's Office has 60 days to certify the delinquent amount. Reimer & Dobrovolny represents the Firefighters' Pension Fund in this matter. ❖

### ***Reimer & Dobrovolny Welcomes New Attorney, Bobby J. Greene***

Bobby J. Greene is an associate attorney with Reimer & Dobrovolny PC. He focuses in public sector labor and employment matters and public sector pension law. Before joining Reimer & Dobrovolny, Mr. Greene was an Assistant State's Attorney with the DuPage County State's Attorney's Office.

Mr. Greene graduated from Benedictine University, earning a B.A. in Sociology/Criminal Justice. In 2001, he served as a full-time police officer with a municipal agency. During his career, he worked as a patrol officer and became a certified advanced patrolman while assisting in department training. Mr. Greene received a Rapid Public Access Defibrillation Response Award and recognition from Advocate Christ Medical Center regarding a lifesaving procedure performed while on duty as a police officer. He was nominated for the officer of the year in his former department because of this incident. Mr. Greene was separated from his department due to an injury sustained in the line of duty in 2012.

After leaving the police department, Mr. Greene graduated cum laude from The John Marshall Law School in 2017, earning a Juris Doctor with certificates in Trial Advocacy and Alternative Dispute Resolution. At John Marshall, he became a published author with the John Marshall Law Review while becoming a member of the National Order of Scribes for outstanding legal writing. Mr. Greene also earned a Cali Award in Evidence and earned 1st place for "Best Direct Examination" in the P.A.D. Mock Trial. He was a Moot Court Competition Quarterfinalist and Herzog Moot Court Competition Quarterfinalist. Mr. Greene was appointed to the Trial Advocacy and Dispute Resolution Honors Board and Council, as an Associate Barrister, then as Vice Barrister.

While at John Marshall, Mr. Greene interned with The Honorable John Darrah of the United States District Court at the Northern District of Illinois where he assisted with the research and drafting of several published opinions. He also interned with

both the Cook County State's Attorney's Office and the United States Attorney's Office.

Mr. Greene believes in giving back to the community, as evident by serving as a teaching assistant with the summer entrance program and Property courses while in law school. Mr. Greene further served as a student ambassador for John Marshall and a student mentor for the Justinian Society, serving as the Vice Chair., Mr. Greene volunteers as an elected member of a south Cook County School District School Board, serving as the Secretary.

Mr. Greene is licensed to practice law in the State of Illinois. He is a member of the American Bar Association, the Illinois State Bar Association, the Chicago Bar Association, and the DuPage County Bar Association. He is also a graduate of the IPPFA/NIU Certified New Trustee Program. ❖

***New Changes to the Training Section  
1.05 of the Open Meetings Act (OMA):  
Addition of part (g)***

P.A. 101-0233

The Legislature passed HB814 on May 23, 2019. The bill was sent to the governor and signed into law on August 9, 2019. The law is scheduled to go into effect on January 1, 2020. According to the General Assembly website, the bill as introduced was designed to "amend the Open Meetings Act." The changes provide three (3) basic elements to part (g) of Section 1.05. First, the new part provides an elected or appointed member of a public body of a municipality may satisfy the training requirements under the Open Meetings Act by participating in a course of training sponsored or conducted by an organization that represents municipalities as designated under Section 1-8-1 of the Illinois Municipal Code.

Second, under (1)-(5), the new law provides content requirements for the training.

Third, it provides if an organization representing municipalities provides training, it must provide a certificate of course completion to each elected or appointed member of a public body who successfully completes that course of training. ❖

***Increased Line-of-Duty Death Benefit  
Bill Passed***

P.A. 101-0028

The Legislature passed House Bill 2028 pertaining to line of duty death benefits for police officers and firefighters. The Act amends Section 12.2 of the State Police Act, 20 ILCS 2610, and Section 3.5 of the Line of Duty Compensation Act, 820 ILCS 315, increasing the burial benefit for police officers and firefighters killed in the line of duty after June 30, 2018 from \$10,000 to \$20,000. ❖

**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.

## **REIMER & DOBROVOLNY PC NEWS**

- July 28-30, 2019, Rick Reimer attended the IPPFA Roundtable retreat in Chicago.
- August 29 and September 19, 2019, Rick Reimer taught the IPPFA certificated trustee training at the NIU Naperville campus.
- September 19, 2019, Mark McQueary attended and presented at the Metropolitan Alliance of Police (MAP) union steward seminar at Benedictine University in Lisle.
- September 24-25, 2019, Mark McQueary taught criminal law at the Suburban Law Enforcement Academy (SLEA).
- October 1-4, 2019, Rick Reimer, James Dobrovoly, and Brian LaBardi attended and presented at the IPPFA MidAmerican Pension Conference in Lake Geneva, Wisconsin.
- October 18, 2019, Rick Reimer will teach Police Supervisory Role in the 21st Century for the Illinois Law Enforcement Training and Standards Board Executive Institute.
- October 21-22, 24, 2019, Rick Reimer will teach at the IPPFA certified trustee training in Hoffman Estates.
- November 1, 2019, Brian LaBardi will attend and present at the IPFA Fall Seminar in Addison.
- November 14, 2019, Rick Reimer will teach the IPPFA certified trustee training at the NIU campus in Naperville.

### *Legal and Legislative Update*

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*Legal and Legislative Update* is published periodically. Questions may be directed to:

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