A Public Safety Law Firm
RDL
REIMER DOBROVOLNY & LABARDI PC

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Legal and Legislative Update

Line-of-Duty Disability Awarded Despite Pre-Existing Mental Health Condition

Village of Franklin Park v. Sardo, 2020 IL App (1st) 191161 (2020)

The Appellate Court in this matter determined a police officer with a preexisting mental condition is not disqualified from a line-of-duty pension. The Court further held that a preexisting physical disability and a preexisting mental condition are treated alike and confirmed that an act of duty need not be the sole cause of disability.

The facts underlying the case were not in dispute. Prior to becoming a Franklin Park police officer in 1996, Detective Christopher Sardo served in the United States Marine Corps from 1987 to 1991, including a tour of duty in Desert Storm. During his tour of duty, Sardo was exposed to several traumatic incidents including the deaths of fellow Marines. Post-discharge, Sardo was diagnosed with PTSD by the Department of Veteran Affairs and received a 90% disability rating, 70% of which was related to PTSD. Sardo received outpatient treatment including counseling, anger management and medication. During his course of treatment, Sardo continued to work full time.

During his time as a police officer, Sardo experienced numerous traumatic events including deaths of firefighters and police officers, none of which rendered him unable to perform his job. Sardo was an exemplary employee with excellent performance reviews including his last review on December 31, 2013.

In This Issue

On February 6, 2014, Sardo responded to a fatal Metra train versus pedestrian accident. Sardo, arrived to disintegrated body parts all over the area. As lead investigator, Sargo collected evidence, interviewed witnesses, reviewed video and notified next of kin.When Sardo showed the victim's husband a photo of a tattooed body part for identification, the husband began screaming and running. Sardo was unable to forget the screaming. Soon after the accident, Sardo began outpatient therapy for depression, PTSD and thoughts of suicide. Sardo stopped working on May 9, 2014 and applied for a line of duty pension on June 22, 2015, asserting a disability due to repetitive work exposure to life threatening and gruesome situations culminating in the Metra accident.

Sardo was examined by three independent medical examiners. In summary, the physicians determined (i) Sardo had PTSD and Major Depressive from his military service but was able to serve as a police officer, (ii) the train accident led to his trauma and triggered his preexisting PTSD, and (iii) he was permanently disabled as a result of the accident.

The pension board concluded the train accident was not the predominate cause but awarded Sardo a line-of-duty disability as the accident contributed to his disability. The Village filed a complaint for administrative seeking administrative review. The Village argued (i) an act of duty must be the sole cause of an officer's disability and (ii) Sardo's police work cumulatively aggravated his PTSD. The Village further argued caselaw supports treating mental and physical disabilities differently and, unlike a physical disability, an officer may not receive a line-of-duty pension for a mental disability when the mental condition preexisted. The circuit court affirmed the pension board's decision and held an act of duty need not be the sole cause of the police officer's mental disability and the board may award a line of duty pension to an officer for a mental disability despite an officer's preexisting mental condition.

The Appellate Court affirmed the circuit court's decision. The Appellate Court reasoned that the words "solely" and "entirely" do not appear under section 3-144.1(a) of the Pension Code. To support their position, the Village cited a firefighter disability case. The Appellate Court noted they do not rely on cases involving a firefighter as authority for determining a line-of-duty disability pension for a police officer and under the Code's plain language, an officer may receive a line-of-duty pension even if the disability is not "solely" caused by an act of duty. Countering the Village's position that the board should treat preexisting mental conditions differently than preexisting physical conditions, the Appellate Court held that the provisions of 3-114.1(a) neither requires nor suggests that the board apply a different standard. To be clear, the Appellate Court confirmed that in order to receive a line-of-duty pension based on a mental disability, the officer needs to establish the disability is a result of a specific, identifiable act of duty unique to police but clarified that a physical disability and mental disability are to be treated alike.❖

Governor Extends Remote Attendance Options

As noted in our last newsletter, permanent amendments to the Open Meetings Act have been enacted in response to the necessity to hold public meetings during the ongoing Coronavirus pandemic.

On September 18, 2020, Governor Pritzker signed the most recent Gubernatorial Disaster Proclamation which remains in effect through October 17, 2020. Those who have been following this issue will note the Governor has been issuing 30 day disaster proclamations in succession since March. It is likely the current proclamation will be extended beyond the current expiration date of October 17, 2020.

As a refresher, the recent amendments to the Open Meetings Act allow a public body the option to hold meetings via phone, video, or other electronic means 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 meetings 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.

Like prior declarations, the September 18, 2020, declaration finds "in person attendance of more than fifty people at the regular meeting location not feasible." Public bodies exercising a telephonic or electronic attendance option must provide notice and allow members of the public to monitor the meeting.

In short, holding pension board meetings solely via phone, video, or other electronic attendance continues to be permissible and likely will remain an option for the foreseeable future.❖

Reimer Dobrovolny & LaBardi PC

Friends and clients, we are excited to announce the formation of Reimer Dobrovolny & LaBardi PC. Effective October 1, 2020, Brian LaBardi will join Rick Reimer and Jim Dobrovolny as a named partner with the firm. Brian has been with the firm since 2012 and a partner since 2018, focusing on public sector pension law, civil/appellate litigation, and employment/labor issues for police officers and firefighters. You may have seen Brian presenting at an IPPFA or IPFA conference.

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

Brian also has an extensive background in private practice civil litigation. He has defended professional malpractice claims, commercial litigation claims, business litigations claims and serious injury claims. In addition, Brian has presented arguments before numerous State appellate courts, the 7th Circuit Court of Appeals, and the United States Supreme Court.

Mr. LaBardi received his undergraduate degree from Valparaiso University and his law degree from The John Marshall Law School in 2006 where he was on the Dean's List. He is licensed to practice law in Illinois, the United States District Court for the Northern District of Illinois, and the 7th Circuit Court of Appeals. He is a member of the Illinois State and DuPage County Bar Associations.

All of us at RDL look forward to providing Illinois' police and fire pension funds with the excellent representation you demand and deserve. Please do not hesitate to contact us if we can be of any assistance! ❖

John Gaw Joins Reimer Dobrovolny & Labardi PC as an Associate Attorney

John recently retired from the Lisle police department after 27 years of service. He started his career in law enforcement in 1993, following 4 years in the United States Marine Corp and service in Desert Storm. As a police officer, he served in many different roles from firearms instructor and SRT, to crash reconstruction and evidence technician. He moved through the ranks and retired as Deputy Chief in September of 2020. In addition to department roles, John served 12 years as President of his local Union and 8 years as a Pension Board Trustee. These assignments gave him a desire to pursue a career in Law. While working patrol shift on midnights he completed his education, receiving his Juris Doctor degree from the NIU College of Law. John is a licensed attorney in both Illinois and Indiana and admitted to practice in Federal Courts for both states. John is passionate about the rights of public safety officers; he looks forward to serving his brothers and sisters in this new role.❖

FOIA Applies to Personal Email and Texts of Public Officials

Better Government Ass'n v. City of Chicago Office of Mayor, 2020 IL App (1st) 190038

The main issue in this case was whether text messages and e-mails sent from public officials' personal accounts qualify as public records under FOIA. Back in 2016, the BGA made two FOIA requests seeking "any and all communication" between the Chicago Department of Public Health and the Mayor's office related to lead in the drinking water at Chicago Public Schools.

The City did not comply with the request and made no effort to ask its officials if they had any responsive records within their personal emails or text messages. At the trial level, the Circuit Court ordered the City to make inquiries of their officials concerning their personal emails and text messages, and supply affidavits from them. The City appealed but lost again. The Appellate Court held that "*communications pertaining to public business within public officials' personal text messages and e-mail accounts are public records subject to FOIA … Accordingly, we affirm the order of the circuit court directing defendants to inquire whether the relevant officials used their personal accounts for public business.*"

The Court's ruling was consistent with a prior opinion from the Public Access Counselor, (PAC 16-006; Request for Review 2016 PAC 41657). This underscores the need to use caution with personal phones and emails. If a communication pertains to public business, and comes to you in your public capacity, it is probably subject to FOIA. Following a FOIA request, you could be required to search your personal accounts, turn over any responsive information, and provide an affidavit as to the presence or absence of any responsive information.❖

Chicago City Council Violated Open Meetings Act During COVID Conference Calls

2020 PAC 62981

In a non-binding opinion, the Public Access Counselor (PAC) at the Attorney General's Office has found the Chicago City Council violated the Open Meetings Act (OMA) by gathering via video/phone conference on several occasions with Mayor Lightfoot to discuss issues related to the City's COVID response.

At issue were four meetings held via video or conference call wherein the Mayor's office shared COVID information with the aldermen. A majority of a quorum of the city council was present at three of the four meetings in question. While no city council action was taken during these meetings, discussion was held regarding the City's COVID response. No agendas were posted, the public was not able to participate, and no minutes were taken. The City council later took action related to several of the matters discussed.

In response to the OMA complaint filed by a news organization, the City referred to these gatherings as "briefings" as opposed to meetings. It further averred the OMA did not apply because the alderman did not attend in their legislative capacity but rather only in their capacity as "community-based first responders". It argued no deliberation occurred and the matters discussed were not "public business". Rather, the aldermen participating in the call were there to receive the most current information on the City's COVID response to share with their constituents. As such, no "meeting" was held as defined by the OMA.

In finding the City violated the OMA, the PAC first found, "when a majority of a quorum of aldermen gather to participate in a discussion about the City's response to a crisis such as the current pandemic, they do so as the legislative body of the City of Chicago even if they do not vote or otherwise take final action on how to respond."

As to the City's argument no "meeting" occurred inasmuch as no deliberation was held, the PAC noted prior opinions and case law holding "discussing public business" under the OMA is broadly construed and includes discussion and exchange of facts prior to making a decision. The PAC held, "Thus, 'public business' includes not only those subjects on which public bodies take action during a gathering, but also the information exchanged relating to matters that public bodies would potentially act upon in the future, regardless of whether action concerning the information is ultimately taken." In short, whether formal action is taken is not determinative of whether a "meeting" occurred under the OMA inasmuch as discussion of public business is sufficient in and of itself to trigger the requirements of the Act.

Ultimately, the PAC concluded the City violated the OMA requirements to post an agenda, hold the meeting at a time and place open to the public, allow for public comment, and keep minutes of all meetings.❖

Mistaken Approval of Service Credit Not Final Administrative Decision

Chappell v. The Board of Trustees of IMRF, 2020 IL App (1st) 1922255 (2020)

The First District Appellate Court determined that an IMRF grant of service credits based upon an IMRF designated agent's erroneous pension eligibility certification was a not a "final administrative decision" pursuant to Section 3-101 of the Administrative Review Law subject to the 35 day rule.

Chappell was the executive director of a not-for-profit community center contracted by River Forest Township ("Township") to provide youth and recreational services from 1986-2002. Chappell, as the executive director, was aware that community center employees were ineligible for IMRF participation as Chappell previously declined participation for community center employees as it was too cost prohibitive. Chappell was paid directly by the community center, not the Township.

In 2002, Chappell was employed by Township as a facilities manager and received salaries from the Township and the community center. Upon his employment with the Township, Chappell completed an enrollment form from IMRF and an "omitted service application" seeking to purchase credit from his years at the community center. Chappell used the Township IMRF employer ID number when listing the community center. The Township's supervisor and designated IMRF agent signed the "omitted service credit application" incorrectly certifying Chappell was a Township employee from 1986 to 2002. Chappell received confirmation from IMRF's "Past Service Unit" indicating he was eligible to purchase 198 months of service credit. Chappell purchased the service credit and retired in 2015.

In 2017, an internal staff audit revealed that the Township certified Chappell's pension eligibility in error as he was not a Township employee between 1986 and 2002. IMRF notified Chappell that his pension would be recalculated. At an

administrative hearing, the hearing officer recommended to the board of trustees of IMRF that Chappell's benefits be recalculated. IMRF accepted the recommendation and the circuit court on administrative review reversed finding IMRF lacked jurisdiction to reconsider the approval of the omitted service application, IMRF didn't have statutory authority to recover the benefits paid in error and last, IMRF was equitably estopped from recalculating the benefits. IMRF and the Township appealed.

Focusing on whether IMRF's approval of Chappell's omitted service credit application was a final administrative decision subject to the 35-day rule, the Appellate Court concluded instead, IMRF made an "interlocutory administrative determination" not subject to the 35-day limitation. IMRF's initial approval was a "rubber stamp approval" highlighted by the fact IMRF did not hold a hearing or listen to testimony. The automated approval process was a statutory process created by the legislature to facilitate the efficient administration of a sizable public pension fund and its reliance on pension eligibility certificates of its participating employers is statutory and practical commonplace. As the approval was not subject to the 35-day limitation, IMRF had jurisdiction to reconsider the initial approval long after the 35 days expired.

Further, the Appellate Court found the Township and IMRF did not have the statutory authority to grant Chappell the omitted service credits because he did not meet the statutory definition of employee. The terms of the Pension Code control who is a qualified employee and no act by a municipality can make an ineligible employee eligible. A decision by an agency that lacks statutory power to enter the decision lacks personal and subject matter and as such, all decisions are void. As such, IMRF's approval was void for want of Pension Code authorization.

Regarding IMRF's authority to recover benefits paid in error, the Court interpreted "error" as defined by Black's Law Dictionary to mean "an assertion or belief that does not conform to objective reality." Specifically, the Court noted that had the legislature intended to limit IMRF's authority to recalculate a pension and recoup the overpayment of benefits to cases involving arithmetical errors, it could have done so. The Court held that neither the Township's certification, nor IMRF's approval conformed to objective reality and since Chappell was ineligible for pension benefits as the employee of a non-participating employer from 1986 to 2002, IMRF was duty bound to retain overpayment amounts.

Last, regarding equitable estoppel, the Court denied Chappell's claim and he knew full well that he did not qualify for IMRF participation from 1986 to 2002 and as such his reliance on the actions taken by the Township and IMRF was not reasonable. Accordingly, the decision of the circuit court was reversed, the decision of IMRF affirmed and the case was remanded for further proceedings not inconsistent with Court's decision.❖

Pension Reform in California-State Supreme Court Rules Pension Modifications are Constitutional

Alameda Co. Deputy Sheriffs' Assn. v. Alameda Co.Employees Retirement Assn., (2020), 9 Cal.5th 1032

In 2013, the California Legislature enacted a number of pension reforms, resulting in several legal challenges.

This case addressed provisions of the new pension law that would exclude certain types of pay when calculating the amount of a pension. Previously, retirement boards had included various forms of additional pay and cash outs, which would inflate the pensions. Unions representing affected public employees challenged whether the new exclusions could be constitutionally applied to people who were hired before the new law.

The California Supreme Court considered their prior decisions applying the "California Rule". The California Rule is the theory that a public employee is vested in the pension benefit that existed at the start of their employment, in such a manner that the

benefits cannot be reduced, even for future years of service, except under exceptionally limited circumstances. To be legal under the California Rule, any changes "must bear some material relation to the theory of a pension system and its successful operation" and changes creating a disadvantage must be offset by a comparable advantage.

In its decision, the Court found the changes were constitutionally permissible because their purpose was to "close loopholes" and prevent potentially abusive practices, such as pension spiking. The Court reasoned that the changes did not need to provide an offsetting new advantage because that would defeat the purpose of closing loopholes that should not have existed originally.❖

Pension Reform in Oregon State Supreme Court Rules Against Employees

Jennifer James, et al. v. State of Oregon, et al., (SC S066933)

The pension system in Oregon has two tiers of defined benefit employees, and a third tier of defined contribution employees. In 2019, the State of Oregon enacted some new pension reform legislation, which was challenged by its public employees. The Oregon Supreme Court denied the claims brought by public employees, which challenged two amendments to the Oregon Public Employee Retirement System (PERS).

The first challenged amendment redirects a member's PERS contributions from the member's individual account program (the defined-contribution component of the member's retirement plan) to a newly created employee pension stability account, used to help fund the defined benefit component of the member's retirement plan. The second challenged amendment imposes a cap on the salary used to calculate a member's benefits.

Public employees primarily argued that the redirection and salary-cap provisions of the new legislation unconstitutionally impaired their employment contracts in violation of the state Contract Clause of the Oregon Constitution. In the alternative, they argued that the amendments violated the Federal Contract Clause, breached their contracts, and constituted an unconstitutional taking of their property without just compensation in violation of the Oregon Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution.

In a unanimous opinion, the Oregon Supreme Court denied the challenges. The Court held that the challenged amendments did not impair contract rights under the state Contract Clause, because the amendments do not operate retrospectively to decrease the retirement benefits attributable to work that the member performed before the effective date of the amendments. The court further explained that, although the amendments operate prospectively to change the offer for future retirement benefits, the pre-amendment statutes did not include a promise that the retirement benefits would not be changed prospectively. ❖

Legislation Proposed to Extend Municipal Funding Deadline

H.B. 5799

As you may recall, along with a change in benefits now known as "tier 2", an amendment to Articles 3 and 4 of the Pension Code in 2011, requires funding of police and fire pension funds using a formula to include "an amount sufficient to bring the total assets of the pension fund up to 90% of the total actuarial liabilities of the pension fund by the end of municipal fiscal year 2040."

Legislation has been introduced to amend this calculation by moving the date 10 years further down the road to 90% funded by 2050. While it is unclear whether the legislation will be called for a vote during the November veto session, it is a priority of municipal organizations who argue the change is needed to accommodate municipalities experiencing budget deficits stemming from the COVID-19 pandemic. Stay tuned. ❖

Suggested Agenda Items for January (or 1st Quarter)

- Approval of annual COLA increases.
- Semi-annual review of closed executive session minutes to determine if it 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

REIMER DOBROVOLNY & LABARDI PC NEWS

- RDL partner Brian LaBardi presented at the IPFA virtual four hour training course on the changes implemented by P.A. 101-0610 on July 2, 2020.
- RDL partner Rick Reimer presented at the IPPFA certified new trustee training at NIU in Naperville on September 23, 2020.
- RDL partner Brian LaBardi presented at the IPPFA MidAmerican Pension Conference held both virtually and in person in Naperville from September 30-October 2, 2020.
- RDL partner Rick Reimer will present at the IPPFA certified new trustee training at NIU in Hoffman Estates on October 19, 2020.
- RDL partner Brian LaBardi will present at the IPFA fall seminar to be held virtually on November 6, 2020.

Legal and Legislative Update

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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:**
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