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Pension board not responsible for police officer's termination

by Joseph Sheahan

In September of this year, the Illinois Appellate Court reminded pension fund participants that pension boards are a separate and distinct entity from their affiliated government employer. While this is not a new or novel concept, the court had an opportunity to reiterate this belief in *Eschbach v. McHenry Police Pension Board*, 2012 IL App (2d) 111179.

In February of 1996, Mary Lee Eschbach was hired as a police officer with the City of McHenry. At the start of her career, Eschbach made contributions to McHenry Police Pension Fund. While attempting to subdue an arrestee, Eschbach injured her left wrist. As a result of this injury, she filed a worker's compensation claim, and about a year and a half after her injury, a line-of-duty pension application. During the time that her pension application was pending, she also developed a blood clotting issue, which required the surgical removal of five clots in her leg over the course of three years. However, she never informed the police department of this condition.

The McHenry Police Pension Board denied Eschbach's line-of-duty pension application on March 31, 2008, finding that the petitioner was not disabled. That decision was reviewed by the appellate court which affirmed the denial of the line-of-duty pension benefits. However, following the denial of her initial application, Eschbach failed to return to work. Likewise, she failed to notify any person in the chain of command that she was not returning to work or that she was suffering from the alleged blood clot condition that prevented her return to duty.

On January 24, 2011, the City issued a notice of separation. This notice stated that Eschbach had failed to return to work following the denial of her line-of-duty pension and listed her last day of employment as June 2, 2010. There was no evidence showing that she received this notice or even if it was mailed to her, but during her testimony, Eschbach admitted that she never returned to work and never notified any person at the department of her condition. On February 14, 2011, over eight months after her last day of employment, Eschbach applied for a non-duty disability pension due to the arterial blood clots in her right leg.

In denying her non-duty disability pension application, the Board made the following findings of fact: 1) Eschach did not report back to duty after the Board's decision denying her line-of-duty disability pension was affirmed by the appellate court in March of 2010; 2) she had been terminated from her employment by the police department in June of 2010; 3) she filed her application for a non-duty disability

Continued on page 2

Changes clarify responsibilities for IMRF Social Security and Medicare contributions

by Brian J. O'Connor

Governor Quinn approved several changes to Illinois Municipal Retirement Fund (IMRF) contributions in signing Public Act 97-0933 on August 10, 2012. These new changes relate to and clarify participant Social Security contributions first provided in P.A. 96-1084 which became effective July 16, 2010.

The first change clarifies that covered employees' Social Security contributions are paid as required by State and federal laws and regulations (40 ILCS 5/7-170 (d)). The second change (in Section 7-171(h)) clarifies that levies for IMRF contributions by participating governmental agencies are to be used to finance the participating governmental agencies' contributions (per Section 7-172 (a)), and expressly deleting permitted use of those monies for the employees' social security contributions (40 ILCS 5/7-171 (h), 7-172(a) and 7-173(b)). This realignment of responsibility for Social Security and Medicare contributions to participating employees rather than participating governmental agencies has been specifically added in other changes (40 ILCS 5/7-172.2).

There are several further changes relating to participating governmental agencies' contributions. A third change

Continued on page 2

Changes clarify reponsibilities

Continued from page 1

provides a corresponding clarification concerning removal of participating governmental agencies' contributions for the employees' social security component (40 ILCS 5/7-172(h)). Finally, it seems no law is complete without exceptions, albeit typically for good reason. A fourth change provides that changes to a participating employee's reported earnings used to determine the final rate of earnings are not applicable to earnings increases under contracts or collective bargaining agreements in effect on or before January 1, 2012 (40 ILCS 5/7-172 (k)). Finally, a fifth change provides when IMRF determines amount of payment due based on final rate of earnings calculations that IMRF shall exclude earnings attributable to personnel policies adopted before January 1, 2012, as long as those policies are not applicable to employees beginning service on or after that date (40 ILCS 5/7-172(k)).

Note that P.A. 97-0933 became effective August 10, 2012. IMRF-participating governmental agencies should review participating employee pay records to ensure that the participating employee – and not the governmental agency – is making the required Social Security and Medicare contributions. Further, IMRF-participating governmental agencies should note not to include these employee contributions in levy calculations. Finally, when seeking to calculate or estimate benefits, be aware of the earnings and payment exceptions possibly available under contracts, agreements or policies in effect prior to January 1, 2012. ■

Attorney Notes...

▪ **Ottosen Britz** attorneys will participate in the Northern Illinois Alliance of Fire Protection Districts 20th Annual Conference being held at the Westin in Lombard February 7 to 10, 2013. Pension sessions by our firm will include: **Shawn Flaherty** - "Ethics." **Ericka Thomas** - "Detecting Fraud in Disability Claims." **David Zafiratos & Laura Weizeorick** - "Basic Legal Principles of Disability Application Process." **Carolyn Clifford & Meganne Trela** - "Worst Case Scenario: Survival Guide for Pension Trustees as Fiduciaries." Please visit the NIAFPD website (www.niafpd.org) for additional information on the conference.

Pension board not responsible

Continued from page 1

pension on February 14, 2011, eight months after her separation of employment; and 4) she had made no pension contributions since 2007. Based on these findings, and the settled law that a pension applicant has to be employed as a police officer on the date of injury and the date of pension application, the Board found the petitioner ineligible for a disability pension.

Eschbach appealed the Board's decision, claiming that she was eligible to apply for a disability pension notwithstanding her termination. First, she argued that she would still be employed as a police officer if not for her disability. Second, she argued that the City's decision to complete the notice-of-separation form on January 24, 2011 was a calculated, bad-faith attempt to deny her right to apply for pension benefits. Finally, Eschbach argued that the police department's failure to notify her of her termination violated her right to notice and a fair hearing. The appellate court rejected all of her arguments and affirmed the Board's decision.

In regards to her first argument, the petitioner argued that the Board relied on inapplicable case law. Specifically, she claimed that she was terminated because of her disability, and that she would still be employed as a police officer but for her alleged blood clot condition. However, the appellate court aptly noted that Eschbach's termination had nothing to do with her alleged disability. She was terminated for failing to report back to work. Moreover, she had not provided an explanation for her absence. The court noted, "When an employee does not show up for work and does not contact his or her employer or give a reason for the absence, it is not unreasonable for the employer to assume that the employee has quit or abandoned employment." At any rate, the court continued, the circumstances surrounding her termination were not at issue. The

Continued on page 4

IMRF limited in its ability to force benefit forfeiture despite apparent guise to circumvent return-to-work provision

by Carolyn Welch Clifford

As the scrutiny of public pension fund abuses continues to pervade the front-page headlines, an Illinois appellate court has recently ruled that the Illinois Municipal Retirement Fund (IMRF) lacked the authority to make a determination that a corporation created by a city employee near the time of his retirement was a "guise" to circumvent the return-to-work provisions under the Illinois Pension Code in *Prazen v. Shoop*, 2012 IL App (4th) 120048.

In *Prazen*, the City of Peru superintendent of the electric department retired in 1998 after purchasing five years of credit under an early retirement incentive provision found in Article 7 of the Illinois Pension Code for certain municipal employees who were eligible (40 ILCS 5/7-141.1). Thirteen days prior to his retirement, the superintendent had incorporated a business, Electrical Consultants, Ltd. Ten days prior to his retirement, the superintendent's new corporation entered into a contract with the City of Peru for the management and supervision of the electric department from which he was retiring. The superintendent's attorney – who also served as outside legal counsel for the City of Peru – contacted IMRF on the superintendent's behalf to inquire about any impact this agreement would have on his retirement pension.

In 2010 IMRF notified the retired superintendent that his continued relationship with the City after his retirement violated the provisions of the early retirement incentive in Section 7-141.1(g) of the Illinois Pension Code, which prohibits a member who retires under the provision from returning to work for an IMRF employer, except under limited circumstances. After a hearing before the IMRF benefit review committee, IMRF Board of Trustees voted to uphold the administrative staff's determination that the retired superintendent had been overpaid $307,100.50 as a result of his early retirement incentive violation. The retired superintendent appealed IMRF's decision to the circuit court, which upheld IMRF's decision.

Upon appeal to the appellate court, the retired superintendent argued that the clear and unambiguous language of Section 7-141.1 requires a finding of "employment" or a "personal services contract" in order to violate the early retirement incentive return-to-work restrictions. The retired superintendent contended that the corporation he formed was not a guise to avoid the early retirement incentive restrictions. Furthermore, he argued that IMRF did not have the authority to make a determination as to whether the corporation's agreement with the City constituted his re-employment with the City or a personal services contract.

The court explained that Section 7-141.1(g) provides only two circumstances under which a retired member must forfeit his or her benefits under the early retirement incentive: where the retired member is "employed" with an IMRF employer as an "employee" or where there is a personal services contract that is not delegable because of the unique skills to be provided by the retired member.

The court further explained that IMRF, as an administrative agency, has only those powers that are granted to it by the Illinois General Assembly and "any action it takes must be specifically authorized by the legislature." As a result, the court concluded that the Illinois General Assembly did not grant IMRF the power to find that a corporation was created solely as a guise to circumvent the return-to-work provisions in Section 7-141.1(g).

The court explained that while the Illinois General Assembly gave IMRF the power to make administrative decisions on participation and coverage necessary for carrying out the intend of the Fund,

Continued on page 4

Proposed bill would extend annual training requirement to two years

In an effort to provide relief to fire and police pension trustees on the initial, as well as annual, training requirements, HB 4666 passed the Illinois Senate in early December and is awaiting passage in the House during the veto session in January.

HB 4666 would require trustees to complete the initial 32–hour training program within two (2) years after taking office, as well provide that trustees complete sixteen (16) hours of training every two (2) years thereafter.

The bill also clarifies what training must cover and when the "biannual clock" begins, and allows "participation on other training opportunities incident to the functioning of the pension board" to count toward the biennial requirement. ■

IMRF limited

Continued from page 3

this general power did not include equitable remedies reserved for the courts. The court stated, "If this outcome is something the General Assembly wanted to avoid, then legislative action is required. We understand why the IMRF Board looked askance at the arrangement between [Electrical Consultants, Ltd.] and the City, but under the present statutory scheme, the IMRF Board did not have the authority to remedy what it viewed as a guise for wrongdoing." The court reversed the determination of IMRF and the circuit court, and vacated IMRF's order.

Although the decision is specific to a unique early retirement provision in Article 7 of the Illinois Pension Code, the court's decision is a reminder to Illinois fire and police pension fund boards that they only have the powers specifically provided to them by state statute. This premise can be frustrating to boards where the states statutes are silent on issues regarding the board's authority in certain circumstances, particularly where there are attempted abuses of the pension system. IMRF has sought review of this case by the Illinois Supreme Court, and additional guidance may be forthcoming on this difficult issue. ■

Pension board not responsible

Continued from page 2

question presented to the Board was whether she was still a police officer on February 14, 2011 when she filed her non-duty disability pension application.

Next, Eschbach contended that the decision to complete the notice of separation on January 24, 2011 was calculated in bad faith in order to deny her the right to apply for a disability pension. Moreover, she claims that the termination was legally invalid because she never received notice of it. Essentially, she argued that because *the Board* failed to notify her of her termination, she was never provided an opportunity to respond to or challenge the decision. The court found her argument wide of the mark. The Board did not terminate Eschbach; the City did. The court noted that the two are separate and distinct legal entities. The City and the Board have discrete identities, constituencies and interests.

Any claim as to whether Eschbach was terminated by the police department in bad faith and whether she did not receive notice of her termination could have and should have been brought against the City. Whatever the reason for her termination, even if unjust, she could be reinstated only by rightful authority, and, until she was reinstated, if at all, it was not in the power of the Board to award her a disability pension. Once it was established that Eschbach was no longer employed as a police officer with the City of McHenry at the time of her application, the Board had no alternative but to deny the pension application.

This case reiterates the important differences between a pension board and its supporting government employer. While the two entities share some common elements, it is important to remember that each is a separate and distinct legal entity and each have their own interests and legal authorities. Moreover, while the actions of the employer may deprive an individual of potential pension benefits, pension boards must stay within the bounds of their authority when determining disability applications. If the pension board finds that the actions of the employer terminated the employment relationship prior to injury or application, the Board must deny the application. ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, Ltd.'s newsletter, ***Legal Insights for Pension Boards,*** is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

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