

If Pension Fund Not on Verge of Default or Imminent Bankruptcy, No Cause of Action for Underfunding, Court Says

Board of Trustees of the Riverdale Police Pension Fund vs. Village of Riverdale,
2014 IL App (1st) 130416

The First District Appellate Court issued its opinion on June 27, 2014. This case may have a far reaching impact on the duty of a municipality to properly fund police (and fire) pension funds.

The Riverdale Police Pension Fund (“Pension Board”) filed a declaratory judgment action, alleging the Village of Riverdale breached its statutory funding obligation under §3-125 and §3-127 of the Pension Code by failing to levy the appropriate amount of taxes from 2000 through 2010. The Pension Board requested the court enter an order declaring that Riverdale’s tax levy contributions were insufficient and require the Village to contribute an amount required by §3-125 and §3-127 of the Illinois Pension Code. At the same time, the Pension Board sought to compel the Village to turn over all pension contributions levied on behalf of the Fund, that were in the Village’s possession. In making its levy requests, the Pension Fund relied upon actuarial valuations by the DOI. The DOI’s recommended levy was forwarded to the Village. At the end of fiscal year 2005, the Village owed the sum of approximately \$615,408.

During discovery, the Village admitted there were certain funds owed to the Pension Fund, as a result of an “accounting practices” oversight, which had been placed in the Village’s pooled account and used for “general operations.” In its response to the Pension Board’s request to admit facts, the Village conceded that from 2003 to 2010, it did not follow the DOI’s recommended levy and did not retain its own actuary to determine the appropriate amounts pursuant to §3-125 of the Pension Code. In reality, the Village levied an arbitrarily determined amount, which was not based upon any actuarial valuation. The Pension Board filed a partial motion for summary judgment as to liability, arguing it was entitled to summary judgment were it was undisputed that there were funds owed to the Pension Fund due to the Village’s failure to remit those property taxes levied by the Village and not transferred to the Pension Fund, and its failure to comply with the tax levy recommendations issued by the DOI.

Relying on *McNamee v. State of Illinois*, 173 Ill.2d 433 (1996), the Village argued that summary judgment was not proper because the Pension Code did not require the Pension Fund to be funded. The Circuit Court denied the Pension Board’s partial Motion for Summary Judgment without explaining its basis for doing so, and provided the Village with an opportunity to file affirmative defenses. The Village filed an affirmative defense

– the Pension Code does not require the pension fund to be funded. At the close of discovery, the Village filed a motion for summary judgment, arguing it was not liable pursuant to *McNamee*, because the Pension Board did not allege any pension fund participant had been denied benefits due to the alleged underfunding and there was no evidence showing benefits had been impaired. In its motion, the Village included deposition testimony from its expert witness, in which that expert testified there was no measurable actuarial damage caused to the pension fund as a result of the alleged underfunding. The expert further testified the Pension Fund did not default on benefit payments as a result of the alleged underfunding. Further, the Village argued the Pension Board failed to provide any evidence showing the Pension Fund was on the verge of default. The Pension Board responded to the Village’s Motion, alleging there were contested issues of material fact. The Pension Board cited testimony from its witnesses, establishing the Village had a net pension obligation of over one million dollars due to the Village’s failure to submit pension contributions in the annual required amount.

On January 14, 2013, the Circuit Court granted the Village’s Motion for Summary Judgment. In its opinion, the Circuit Court noted that the Village admitted it did not follow the DOI’s actuarial recommendations for the years 2003 through 2010. The court further determined that *McNamee*, was factually distinguishable, “because it did not address the issues in this case, to wit: whether the Pension Board had a vested contractual right to the pension funding level in the Riverdale Police Pension Fund.” The trial court noted that this was a case of first impression, and went on to analyze Illinois cases dealing with statutory funding under the Pension Protection Clause contained in Article XIII, Section 5 of the Illinois Constitution. The trial court concluded, based on the plain and ordinary language of the Statute, “the legislature could not have intended to remove all discretion from the municipality in the determining the amount of tax levies and contributions to the pension fund in any particular year.” Accordingly, the court granted the Village’s Motion for Summary Judgment. An appeal followed.

According to the Appellate Court, the issue before the Court was “whether the plain language of the Pension Code created a contractual obligation under which the Village was required to remit funds to the pension fund in concert with that reported as necessary by the Pension Board?” The court engaged in a detailed analysis of various Illinois Supreme Court cases, including the *McNamee*, *Lindberg*, and *Sklodowski* cases. The court concluded Sections 3-125 and 3-127 of the Pension Code have *not* been interpreted by the courts to require the levying of taxes in strict concert with the funding recommended by the Village Board. Further, the court recognized the Illinois Supreme Court has consistently held that a beneficiary is entitled to receive pension benefits, but the reserve portion of the “annual requirement” is not a fixed entitlement. Unfortunately, the Court concluded the Pension Board did not satisfy its burden of citing specific language of the

Pension Code that demonstrated a legislative intent to establish a contractual right to funding. In the Court's opinion, its conclusion was further supported by the Legislature's enactment of Public Act 98-599, which provided as of July 1, 2014, the four state pension systems with the express right to file suit if the State does not maintain the funding levels called for by Public Act 98-599. The Court viewed the Legislature's action provided evidence that the Pension Code does not provide "an implied right" to enforce funding levels. Recognizing the *McNamee* Court established a cause of action need not wait until benefits are actually diminished, the Court held, in this case, the Pension Board did not provide evidence that the Riverdale Police Pension Fund was on the "verge of default or imminent bankruptcy." The Court noted the Pension Board failed to establish any beneficiary had been denied benefits.

Summarizing its opinion, the Court held the statutes provide the Village with discretion in implementing the funding recommendations certified by the pension board, and where no evidence was provided that the pension fund was at risk of denying benefits, the Village was entitled to summary judgment as a matter of law. The Court explained: "Simply stated, the Statutes do not provide a cause of action for underfunding, so long as there is no allegation or proof the fund at issue is on the verge of default or imminent bankruptcy."

However, there was some good news. The Pension Board did allege the Village had improperly retained property taxes levied on behalf of the pension fund, but not paid to the Pension Fund, as required under Section 22-403 of the Pension Code. To the extent the Village collected money on behalf of the Pension Fund, the Appellate Court reversed the portion of the Circuit Court's Order denying the Pension Board's Motion for Summary Judgment. The Court remanded the matter back for determination as to the amount of property taxes collected by the Village that was owed to the Pension Fund.

This is obviously a troubling case for all downstate pension funds. No doubt some municipalities will view this decision as a green light to shirk their responsibility to annually fund its police and fire pension funds. Hopefully, the Illinois Supreme Court will review this case, if a Petition for Leave to Appeal is filed and granted. In the meantime, pension funds may need to wait for the enforcement provision contained in Sections 3-125 and 4-118 of the Pension Code take effect in fiscal year 2016. Unless, of course, the legislature in its infinite wisdom repeal the enforcement provisions. Our attorneys will continue to monitor this important case.