LEGAL UPDATE HANDOUT

I.

PENSION BOARD CASES

A. Williams v. Board of Trustees of the Morton Grove Firefighters Pension Fund, 398 Ill.App.3d 680, 924 N.E.2d 38 (1st. Dist. 2010). Plaintiff, a firefighter filed an application for a line of duty, and in the alternative, non-duty disability benefits with the Morton Grove Firefighters' Pension Fund as a result of an alleged on-duty injury to his shoulder. The day of the hearing, the Village filed a Petition to Intervene based on three grounds. First, that it had an interest in insuring the proper expenditure of public funds. Second, that it had an interest in the potential award of health care benefits under PESBA. Third, that the Village would introduce a full evidentiary record upon which the Board could base its decision. The parties were fully allowed to brief the intervention issue, and a hearing was held. Ultimately, the Pension Board ruled that the Board had discretion to allow the Village to intervene.

The plaintiff made an oral and written motion to recuse the mayor, the Village corporate attorney, the Village clerk, and Village treasurer that sat on the Pension Board, alleging a per say conflict of interest, once the Village was permitted to intervene. The individual trustees challenged refused to recuse themselves, stating that they were not biased and could be fair and impartial.

The hearing was conducted on the disability application, and there was conflicting evidence as to the cause of the disability. The trustee that was the

Village attorney, played an active role in the case, over the objection of plaintiff. At the conclusion of the hearing the Pension Board denied plaintiff a line of duty disability, but awarded a non-duty disability pension.

Plaintiff filed a complaint for administrative review in the Circuit Court, which affirmed the Pension Board's decision. Plaintiff filed an appeal based on the following grounds: 1. The Pension Board's denial of his line of duty disability was against the manifest weight of the evidence. 2. Allowing the four Village representatives to participate in the hearing, after the Village intervened, violated his right to due process. 3. That the Board abused its discretion when it permitted the Village to intervene in the hearing.

On appeal, the Court did not address the Pension Board's decision to deny the line of duty disability, because it vacated the Board's decision on other grounds and remanded it for a new hearing. With respect to the allegation that the Board's decision to allow the Village to intervene was an abuse of discretion, was a "close question" according to the Court. The Court ultimately found that the Board did not abuse its discretion because the Village filed its Petition before the hearing started, and the Village described some additional evidence that it would offer during the hearing, to assist the Board with its fact finding regarding the application. Therefore, the Court could not say the Board acted arbitrarily or capriciously when it granted the Village's petition to intervene. The Court did note, however, that protecting a municipality's interest in the proper expenditure

of funds may be a sufficient basis for permitting intervention, when combined with "another interest."

Finally, addressing the Plaintiff's arguments that he was denied due process, the Court recognized that it was an open issue in Illinois whether a police officer or firefighter who has applied for a disability pension has a protected property interest in that disability pension, before a board determines that a person is eligible for those benefits. However, an applicant for benefits does have a right to due process, which includes a right to a fair and impartial hearing. In order to determine whether a board afforded an applicant a fair and impartial hearing, the court must examine the procedures employed during the hearing to determine whether those procedures were fair and impartial.

The Court rejected the Plaintiff's argument that participation at the Pension Board hearing by Village officials, who were also trustees, did not create a *per se* conflict of interest. The Court reviewed the Legislative intent of the statutory change to the pension boards, creating a five member board, verses the previous statutory scheme. The Court concluded that the intent of the Legislature would be contradicted if there was an automatic disqualification of Village appointed officials. The Court then focused on the conduct of the Board Trustee who was also the Village attorney, and corporate counsel.

In order to establish bias, the plaintiff must establish that members of the adjudicating body, to some extent, had adjudged the facts as well as the law of the case, in advance of the hearing. There must be more than the mere possibility of

bias or that the decision maker is familiar with the facts of the case. The Court reaffirmed the principal that if one decision maker on an administrative body is not completely disinterested, that trustee's participation infects the action of the whole body, and makes it voidable.

In this case, the Court concluded that the Village Attorney/Trustee overstepped her bounds as a fair and impartial decision maker. Prior to the hearing, the Village Attorney/Trustee provided the Intervener's attorney with a copy of the entire record. That decision was unilateral and *exparte*. During the hearing, the Village Attorney/Trustee repeatedly objected to evidence offered by the Plaintiff, questioned the relevance of a line of questioning by Plaintiff's counsel, and moved to strike one of the Plaintiff's answers, and also objected and moved that an entire line of questioning be barred. Furthermore, the Village Attorney/Trustee extensively questioned certain witnesses, more than any other members of the Pension Board. The Court concluded that the Village Attorney/Trustee's advocacy role in support of the Village and against the Plaintiff, infected the entire proceedings and denied Plaintiff a fair and impartial hearing.

Accordingly, the Court reversed and remanded the case to the Board for a new hearing on Plaintiff's application. The Court further determined that on remand, the Plaintiff's hearing would be conducted before a five member board, under the newly enacted provisions of §4-121 of the Pension Code, meaning a five member board of trustees.

B. Peacock v. Board of Trustees of the Police Pension Fund of South Chicago Heights, 395 Ill.App.3d 644, 918 N.E.2d 243 (1st Dist. 2009). Plaintiff was a police officer hired in 1984, who between 1988 and 1991 sustained multiple injuries to his lower back, which ultimately led to the South Chicago Heights Police Pension Board awarding him disability benefits in 1991. Between November 1992 and April 2005, the Plaintiff was evaluated by several physicians retained by the Board to conduct annual examinations pursuant to §3-115 of the Illinois Pension Code. Virtually all physicians found that Plaintiff remained disabled. Starting in 1998, some of the physicians indicated that the Plaintiff may be able to return to full and unrestricted duty, however, the Plaintiff underwent subsequent treatment and remained on disability until February of 2006.

In February 2006, Plaintiff received a note from the Village treasurer stating that the Board had elected to withhold the payment of his benefits until he had been examined by one of the Pension Board's physicians. He went to that examination. He was later told that it was written in error, and his benefits were reinstated. The Pension Board ultimately had the Plaintiff examined by Dr. Lanoff, and Dr. Lanoff certified that the Plaintiff was not disabled and capable of returning to his full and unrestricted duties as a police officer. After receiving Dr. Lanoff's report and certification, the Board unilaterally discontinued payments of his disability benefits without notice or hearing. The Board met on June 13, 2006, and on June19, 2006 the police chief sent the Plaintiff a letter informing him that the Board had "cleared him to return to work" and he was to report for duty on

July 10, 2006. Plaintiff's disability benefits were terminated by the Board effective April 10, 2006, the date of Dr. Lanoff's report.

Ultimately, over one year later, a hearing was held before the Pension Board in October 2007, after demand for hearing was made by the Plaintiff's attorney. At the hearing, the Plaintiff was the sole witness, the plaintiff did not present any evidence other than his treating physician's reports, in which he concluded Plaintiff remained disabled. The Plaintiff did not call his treating physician as a witness, nor did he present that physician's deposition testimony. The Board introduced the deposition testimony of Dr. Lanoff who concluded that the Plaintiff was no longer disabled, and Board issued its written decision on January 17, 2008, finding that Plaintiff was no longer disabled based on Dr. Lanoff's opinion.

Plaintiff filed a two count Complaint in the Circuit Court on two grounds. First, that the Pension Board's decision to terminate his benefits, based on Dr. Lanoff's findings, was against the manifest weight of the evidence. Second, that the Board violated his due process rights under 42 USC §1983, and sought attorneys fees pursuant to 42 USC §1988. The Circuit Court entered a judgment as to Count I, affirming the Board's decision that the Plaintiff was no longer disabled, the Court did not rule on the violation of due process allegation. An appeal followed.

With respect to the decision to terminate the officer's disability benefits, the Court found that the decision was not against the manifest weight of the evidence.

Relying on precedent, the Court reaffirmed the principle that the finding of one physician, finding that an officer is no longer is disabled, is sufficient for purposes of §311-5 and §311-6 of the Pension Code. The Court held that the Pension Board was acting within its discretion to weigh conflicting evidence and determine what weight to put on which physician's reports. The Court found that the Board's reliance on Dr. Lanoff's report was sufficient to terminate the officer's benefits.

More problematic for the Board, however, was the Board's failure to afford him due process before discontinuing payment of his disability benefits prior to conducting any hearing. The Court relied heavily on Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) establishing that administrative proceedings must provide a party affected with a meaningful procedure to assert his claim prior to the deprivation or impairment of a property right. There was no question, according to the Court, that a police officer in receipt of disability benefits has a protectable property interest. The Court applied the principles set forth in Matthews, to determine whether or not Plaintiff was deprived of his due process rights, because it did not grant him a hearing prior to discontinuation of his benefits. The Court concluded that the Plaintiff was not afforded any administrative procedure before his benefits were terminated, because he was not granted any opportunity to submit any evidence or make arguments to refute the accuracy of Dr. Lanoff's opinion, he was not provided with a copy of Dr. Lanoff's examination report or summary, or reasons why the Board discontinued his

benefits. Accordingly, the Court held that the Board's discontinuation of Plaintiff's disability benefits, without notice or any form of pre-deprivation hearing, did not comport with the requirements of due process.

The Court did however reject Plaintiff's claim that the Board violated his due process at the hearings conducted after October 2007, just because it relied upon Dr. Lanoff's report. Plaintiff's theory was the Board somehow impermissibly delegated Dr. Lanoff the authority to determine whether or not the officer remained disabled. The Court soundly rejected this argument.

The Appellate Court affirmed the termination of the police officer's benefits as a result of the proceedings that occurred in October 2007. However, because the Circuit Court did not dispose of Count II, where damages were sought under 42 USC §1983, the Court reversed and remanded that portion of the Circuit Court judgment to conduct further proceedings. The Court further instructed the Board to reinstate the Plaintiff's entitlement to disability benefits from April 10, 2006 through January 17, 2008, the date of entry of entry of the Board's final administrative decision following the post-deprivation hearing.

C. **Kramarski v. Board of Trustees of the Village of Orland Park Police Pension Fund, __ Ill.App.3d __, 931 N.E.2d 851 (1st Dist. 2010).**

The Plaintiff claimed that she suffered a neck injury during a training exercise in 1996. She subsequently underwent a three-disc cervical fusion in 1999. The Plaintiff claimed that she also suffered post-traumatic stress and

depression due to the injuries she allegedly suffered during the 1996 training exercise.

The Village of Orland Park terminated Plaintiff's employment in 1999 for unrelated reasons. The Plaintiff sued the Village and was reinstated in 2002. She worked one day. The Plaintiff settled her lawsuit against the Village sometime in February 2003. As part of the settlement agreement, the Plaintiff would no longer work for the Village. However, prior to settlement with the Village, the Plaintiff filed an application with the Pension Board requesting line-of-duty mental and physical disability pensions. During her pension hearings, the Plaintiff claimed two trustees were biased against her and moved to recuse them. The two trustees refused to recuse themselves. Following several hearings, the Pension Board denied Plaintiff's application and found the Plaintiff was not mentally or physically disabled. The two trustees who refused to recuse themselves participated in the hearings but, in the end, abstained from voting.

The Plaintiff appealed and the trial court partially reversed the Pension Board. The trial court affirmed the Pension Board's conclusions that the Plaintiff was not mentally disabled and that any disability did not result from the performance of an act of duty. However, the trial court reversed the Pension Board's decision that the Plaintiff was not physically disabled as a result of her three-disc cervical fusion. Therefore, the trial court awarded the Plaintiff a not-on-duty physical disability pension.

The Plaintiff appealed the trial court's order and claimed she was entitled to line-of-duty mental and physical disability pensions. The Plaintiff also argued that she was denied the right to a fair and impartial hearing because the two trustees failed to recuse themselves. The Pension Board cross-appealed and claimed the trial court erred in reversing the Pension Board's decision that the Plaintiff was not physically disabled. The Appellate Court reversed the trial court and upheld the Pension Board's conclusion that the Plaintiff was not entitled to either a mental or physical disability pension. The Appellate Court also held that the Pension Board did not violate the Plaintiff's right to a fair and impartial hearing.

Fair and Impartial Hearing

The Plaintiff specifically named one trustee as a defendant in her lawsuit against the Village. The Plaintiff alleged that another trustee was one of the fellow officers who allegedly created a hostile work environment. The Appellate Court rejected the Plaintiff's argument that this constituted sufficient evidence to demonstrate the two trustees were biased against her. The Court held, "plaintiff's only evidence of bias is the sexual harassment lawsuit against the Village of Orland Park, settled without a decision on the merits."

Additionally, the Appellate Court concluded that the trustees' participation in the hearing and subsequent abstention on the vote did not demonstrate bias. The Appellate Court held, "[p]laintiff cites to no case, nor are we aware of one, where abstention on a vote can be read as probative of bias." Rather, the plaintiff

only pointed to the "mere possibility" of bias and this was insufficient to justify recusal.

Line-of-duty Disability Pension

The Appellate Court affirmed the trial court's order affirming the Pension Board's finding that Plaintiff's alleged disability did not result from the performance of an act of duty. The Plaintiff claimed her injuries stemmed from the training exercise. However, two witnesses testified during the disability hearing that the Plaintiff was not injured during the training exercise. Additionally, the Appellate Court cited approvingly to the Pension Board's decision to reject Plaintiff's testimony based on a finding of several doctors who examined Plaintiff in regards to her mental disability claim that she was "not believable." At least one doctor diagnosed the Plaintiff as a "malingerer."

Not-on-duty Disability Pension

The Appellate Court reversed the trial court's order reversing the Pension Board's finding that the Plaintiff was not physically disabled. Two of the Pension Board's examining doctors concluded she was physically disabled. A functional capacity evaluation concluded the Plaintiff was physically disabled. The Plaintiff's treating physicians concluded she was physically disabled. However, one of the Pension Board's doctors concluded the Plaintiff was not physically disabled and that Plaintiff could return to work with some additional work hardening and strengthening. The Appellate Court concluded that the

administrative record contained some competent evidence to support the Pension Board's conclusion that the Plaintiff was not disabled.

Importantly, the Court held that the Pension Board properly considered Plaintiff's lack of credibility in rejecting those medical opinions that were premised primarily on Plaintiff's subjective complaints. Additionally, the Court held that the Pension Board properly rejected medical opinions that the Plaintiff was disabled premised on the "possibility" that the Plaintiff may incur a "future disability" rather than Plaintiff's actual present inability to be a police officer. In other words, the fact that the Plaintiff has a cervical fusion and that a future altercation as a police officer may compromise the fusion and thereby render the Plaintiff disabled is not a present disability within the meaning of the Pension Code.

It should be noted that one Justice dissented, and would have affirmed the trial court's order, that the Plaintiff was entitled to a not-on-duty disability pension. The Appellate Court denied the Plaintiff's motion for a rehearing and the Plaintiff did not file a petition for leave to appeal to the Supreme Court.

II.

MISCELLANEOUS CASES

A. People of the State of Illinois v. Bauer, 2010 WL 2780426 (5th Dist. 2010). While not a pension case, this case involves disclosure of medical records pursuant to a subpoena issued by a grand jury in a criminal

proceeding and addresses the parameters of the Health Insurance Portability and Accountability Act of 1996 (HIPPA).

The defendant was indicted on two counts of felony aggravated driving under the influence of alcohol (DUI). The State's Attorney, through the grand jury procedure, obtained copies of hospital records pertaining to the defendant's treatment for injuries following the automobile accident that lead to the indictment for aggravated DUI charges. Eventually, the State's Attorney and grand jury obtained lab blood alcohol serum results, which indicated that the defendant's serum-alcohol-concentration result was .104.

The defendant moved to suppress the blood results, which he claimed the State had obtained by misusing the grand jury power, and that it improperly acquired confidential medical information protected under HIPPA. The Court denied the motion to suppress. A stipulated bench trial was conducted, and the defendant was found guilty of a misdemeanor DUI. Following the conviction, the defendant moved for a new trial, which was denied, and an appeal followed.

The importance of this case is the Appellate Court's analysis of the defendant's contention that the State's conduct violated HIPPA. In dealing with applicable local case law concerning the purpose and intent of HIPPA, the Court concluded that the State did not violate the relevant provisions of HIPPA.

According to the Court, HIPPA does not create a privilege for patient's medial information, it merely provides the procedures to follow for disclosure of that information from a "covered entity" (citation omitted). The "covered entity"

is defined to include health care plans, health care clearing houses, and health care providers (citation omitted). Moreover, the application of HIPPA's privacy rule is limited to health care plans, health care clearing houses, and qualified health care providers, each of which is defined as a "covered entity."

Similarly, HIPPA does not provide that evidence given in violation of HIPPA should be suppressed or excluded in a criminal trial, and HIPPA does not provide for suppression of evidence as a remedy for a HIPPA violation (citation omitted). Under HIPPA, the remedies for violation of HIPPA are imposed upon the "covered entity" that disclosed the information. The Court concluded that the State's conduct did not violate HIPPA.

In adjudicating disability claims, pension boards will routinely obtain applicant's medical records. Records should be obtained through use of HIPPA compliant consent forms signed by the applicant, authorizing disclosure to the pension board or via issuance of an administrative subpoena to the medical provider, to insure that medical records are obtained by the appropriate method. This case would appear to stand for the proposition that a pension fund is not a "covered entity." However, those records once obtained, should not be distributed to persons other than the pension board's physicians. Once admitted into the administrative record, those records would be subject to disclosure under the Illinois Freedom of Information Act, but privacy information must be redacted.

III.

PUBLIC SAFETY EMPLOYEE BENEFIT ACT CASES

A. Gaffney v. Board of Trustees of the Orland Fire Protection District, et al., 397 Ill.App.3d 679, 921 N.E.2d 778 (2009). This case was decided by the First District Appellate Court, Sixth Division on December 24, 2009. Plaintiff Gaffney, a firefighter injured in a live fire training exercise in 2005, when he sustained severe injury to his left shoulder. Plaintiff applied for and was awarded a line of duty disability pension by the Orland Park Fire Protection District Firefighters Pension Board in April of 2007. Thereafter, Plaintiff applied to the District for healthcare insurance benefits under the Public Safety Employee Benefits Act (PSEBA) 820 ILCS §320/10(b) (West 2006). The District passed an ordinance establishing procedures for its firefighters to apply for PSEBA benefits. Plaintiff applied, a hearing was conducted, the Plaintiff submitted evidence through his attorney, and the District denied the Plaintiff's application, finding that the Plaintiff was not responding to what he reasonably believed to be an emergency at the time of his injury. Plaintiff sought review with the Circuit Court under various theories, and ultimately the Court treated Plaintiff's complaint as a petition for a common law *writ of certiorari.* The Trial Court affirmed the District's denial of plaintiff's application for PSEBA benefits, finding that Plaintiff was not responding to what he believed to be an emergency under the Act. The Court found that, while the exercises are undeniably dangerous and presented certain unknown difficulties expected in any exercise, danger and

unknowns are not sufficient to constitute an "emergency" as that term is defined in the Act. An appeal followed. On appeal the Plaintiff argued that the District was not permitted to pass an ordinance setting up procedures which he alleged were contrary to PSEBA. That argument was rejected by the Court. The Court focused on Plaintiff's allegation that his injury occurred in response to what he reasonable believed to be an emergency under §10(b) of PSEBA. The Court framed the issue as: whether Plaintiff's injury occurred while Plaintiff was engaged in one the listed tasks in §10(b) of PSEBA, i.e., whether he was responding to what he reasonably believed to be an emergency? The District argued that a training exercise does not qualify. The Court adopted the First District Appellate Court's definition of "emergency" as contained in DeRose v. City of Highland Park (citation omitted) as one where it is "urgent and calls for immediate action."

Applying that definition to the facts, the Court reviewed the Plaintiff's testimony at the hearing before the District, during which he testified that he did not believe he was responding to an emergency, and that he knew that this training exercise was not an actual emergency, and that it was a live fire training exercise. Further, Plaintiff acknowledged that not all training exercises involved live fire. Although Plaintiff was instructed to treat the training exercise as an emergency, the Court held that an instruction to treat a training as though it was an emergency, does not make it an "emergency" under the language of PSEBA. The Court concluded that Plaintiff did not have a reasonable belief that he was responding to an emergency, and that he was not entitled to benefits.

The Court found further support for its conclusion after reviewing the applicable provisions of line of duty disabilities pursuant to 40 ILCS §5/4-110 of the Pension Code. The Court noted that the language contained in the Pension Code was broader than that used PSEBA, and under the Pension Code, any injury that occurred during participation in a training exercise would be considered an act of duty. O'Callaghan v. Retirement Board of Firemen's Annuity and Benefit Fund (citation omitted). In contrast, PSEBA adopted a narrower definition in §10(b) of PSEBA.

Justice Robert Gordon dissented, and in a detailed written dissent, Justice Gordon indicated that the Plaintiff should have been granted benefits because his injury was sustained during response to what he reasonably believed to be an emergency. Ok, so now read the next case! Same issue, same employer, different result by a different division of the First District Appellate Court. f

B. Lemmenes v. Orland Fire Protection District and Board of Trustees of the Orland Fire Protection District, 399 Ill.App.3d 644, 927 N.E.2d 2010 (1st Dist. 2010). This case was decided on March 23, 2010 by the First District Appellate Court, Second Division, after the Sixth Division's decision in Gaffney set forth above. The Plaintiff in this case was a fire lieutenant with the Orland Fire Protection District (the District) when he injured his right knee at a training exercise held on September 17, 2002. Ultimately the pension board awarded the Plaintiff a line of duty disability pension. Following that award, Plaintiff requested that the District pay Plaintiff's health insurance coverage benefits under

PSEBA. The District denied that request and Plaintiff sought a declaratory judgment in the Circuit Court of Cook County.

Discovery was conducted and depositions were taken. The following facts were relevant to the Court's determination. Plaintiff was made aware that he was involved in a training exercise, however, he was ordered to respond as if it were an actual emergency. He was informed by his superiors that a firefighter was trapped inside a building, and that the trapped firefighter was running out of oxygen, and that the Plaintiff, and other participants of the exercise, must locate and rescue the trapped firefighter or he would perish. The Plaintiff arrived at the location in a fire engine with its emergency lights activated, and he was dressed in full turnout gear, as he would have been dressed in any emergency situation. In addition, the Plaintiff's mask was "blacked out" in order to simulate live fire situations. The person responsible for the training exercise was overseen by a firefighter from another jurisdiction, who testified that the training exercise was modeled after a real life fire tragedy in Phoenix, Arizona, in which Phoenix firefighters were unsuccessful in rescuing a fellow firefighter from a burning industrial building. The purpose of the training exercise, while not disclosed to the Plaintiff or other participants, was to impress upon those firefighters that rescue techniques employed in a residential building could not be used in an industrial setting. Plaintiff also testified that he would have been disciplined had he refused to participate in the training exercise.

The injury to Plaintiff's knee occurred while he was twisting and pulling the alleged victim, trying to free him from an unknown restraint. It was undisputed that the Plaintiff was catastrophically injured within the meaning of §10(a) of PSEBA. The Court granted the Plaintiff's motion for summary judgment finding that he was catastrophically injured under §10(b) of the Act, that requires that the injury must have occurred as a result of the firefighter/officer's response to what is reasonably believed to be an "emergency." The District filed an appeal.

On appeal, the Appellate Court granted the Associated Firefighters of Illinois (AFFI) leave to file an *amicus curiae* brief. The sole issue on appeal is whether Plaintiff met the requirements under §10(b) of the Act. The District made numerous arguments, all which were soundly rejected by the Court. First, the District argued that the injury did not occur in "response to what is reasonably believed to be an emergency," because the injury occurred in the course of a training exercise. The District also argued that an "emergency" under §10(b) of PSEBA must be an actual one. Finally, the District argued that the "response" to an emergency under §10(b) of the Act must be one that stemmed from a public call for help.

The Court noted that the Act did not define the term "emergency" for purposes of §10(b). The Court adopted the First District Appellate Court's definition of "emergency" in DeRose v. City of Highland Park (citation omitted).

The DeRose Court, using guidance from Webster's Third International Dictionary, defined "emergency" as a situation that is "urgent and calls for immediate action."

Applying that definition of "emergency" and the plain language of §10(b) of the Act, the Court concluded that the Legislature did not intend to restrict emergency situations to one specific kind, nor did it intend to eliminate training exercises as an exception to the ordinary meaning of the Statute. Nor did the Legislature intend to distinguish between an actual or a simulated emergency such as the facts of the case. Finally, to accept the District's suggestion that the "emergency" must be actual, would lead to an absurd result.

Accordingly, the Court affirmed the Trial Court's granting of Plaintiff's motion for summary judgment. The Court held that based on the facts of this case, the firefighter was catastrophically injury as a result of what he reasonably believed to be an emergency situation because that was what the exercise required of him, and he reasonably believed that he was responding to an emergency under the uncontradicted circumstances involved in that training exercise. The Court stopped, however, by cautioning that it was not ruling that catastrophic injuries that occur during ***any*** (emphasis added) training exercise would automatically entitle an injured firefighter or police officer for PSEBA benefits. Rather, it was the unique set of facts and circumstances which lead to the Court's ruling.

The Illinois Supreme Court granted a Petition For Leave to Appeal in Gaffney and Lemmenes on May 26, 2010, due to the conflict between the two cases. Stay tuned!

IV.

RULE 23 AND (NON-PRECEDENTIAL) PENSION SPIKE CASES

A. Schultz v. Board of Trustees of the Willow Springs Pension Fund, Case No. 1-08-2770 (1st. Dist. April 21, 2010). Schultz announced his retirement as Chief of Police of the Village of Willow Springs in May 2002. In November 2002, the Village Board of Trustees agreed to raise Schultz' salary from approximately $60,000 per year to approximately $80,000 per year. Minutes of the Village Trustee's meeting explicitly noted that Schultz' pay was to be increased so that his "final pension numbers will work out in a positive manner." Schultz received two paychecks from the Village based upon the $80,000 amount, and retired on December 6, 2002.

For December 2002 and January 2003, Schultz received two pension checks calculated on the $80,000 salary amount. In February 2003 the Willow Springs Police Pension Fund began to issue checks to Schultz based upon his pre-increased salary ($60,000 salary). The Pension Board informed Schultz in March of 2003, that it would hold hearings on the salary to be used to calculate his pension. However, these hearings did not occur until November 2005, and October 2006. Schultz requested that the Board base his pension on the higher salary figure, but that request was formally denied by the Pension Board by written decision in December of 2006.

Schultz sought administrative review in the Circuit Court of Cook County. The Circuit Could held that the Board lacked jurisdiction because it rendered an

administrative decision when it paid Schultz benefits in December 2002 and January 2003, and that payment constituted a "final administrative decision" under Administrative Review Law. The Board appealed.

On appeal, Schultz did not file a brief. The Court considered the Pension Board's arguments, and reversed the Circuit Court. The Board asserted that issuance of calculated pension checks alone, cannot be considered a "final administrative decision." The Court agreed. The First District Appellate Court had previously rejected the contention that pension payments, alone, constituted a "final administrative decision." See, Fields v. Schaumburg Firefighters' Pension Board (citation omitted). However, such payments when combined with evidence of formal application for benefits, a decision on the application, and the communication of the decision will constitute a "final administrative decision" for purposes of Administrative Review Law. See, Sola v. Roselle Police Pension Board (citation omitted).

In this case, there was no evidence of decision making formalities other than the erroneous payment of pension benefits by a clerical official at the Village. There was no hearing, formal action taken by the Board, or any reflection of the Board authorizing increased payments in the record. Finally, the Court held that the Village's approval of an increase in Schultz' pay would not increase his salary for pension calculation purposes, unless that increase was also reflected in the Village's formally adopted budget. The Village's appropriation ordinance for 2002, allocated approximately $60,000 for Schultz' salary, and there was no

evidence in the record indicating a modification of the 2002 budget, nor an increase in the allocation for the police chief's salary for 2003.

Accordingly, the Pension Board properly denied Schultz' request to have his pension calculated at the higher rate.

B. Kocek v. The Police Pension of the Village of Tinley Park, Case No. 1-09-0806 (1st Dist. March 29, 2010). Kocek, a police commander, was considering retirement. At the time, the Village had commissioned Northern Illinois University (NIU) to conduct a pay and compensation study. Kocek made inquiries as to whether or not, if a salary increase was awarded, and he retired, whether his pension would be recalculated based upon the Village's adoption of the pay plan. On January 14, 2006, Kocek retired and began receiving benefits prior to the completion of the NIU pay and compensation study. On April 28, 2006, the Village enacted a new salary ordinance for the fiscal year beginning May 1, 2006 and ending April 30, 2007. The Police Commander's salary was set at a range of minimum of $75,000 and a maximum of $97,000. Kocek retired before May 1, 2006!

Before the May 17, 2006 board meeting, the Board received the new benefit calculation sheet for Kocek, showing his increased pension amount. The Board President contacted the Treasurer and requested documentation to support the new amount, and was told that there was no documentation. The Treasurer informed the Board President that all Commanders received the same amounts, and that they had all received a retroactive salary increase to January 1, 2006. The

President attempted to confirm that with three other Commanders, but they refused to disclose the amount of the increase. At the May 17, 2006 Board meeting the Pension Board voted to readjust Kocek's pension based upon the adjusted base salary of $94,000. Following that, in October 2006, the Board President found what he believed to be a discrepancy in the amount of benefits that Kocek was receiving, when compared to the other Commanders. The Board's attorney sent correspondence to Kocek informing him of a potential discrepancy, and that a hearing would be held on the issue, in order to verify the accuracy of his salary amounts. Kocek's benefits were never reduced.

Plaintiff filed a motion for a temporary restraining order (TRO). The Parties agreed to treat the TRO as a preliminary injunction, which was entered without prejudice. The Court allowed the Pension Board to conduct discovery to determine whether or not either Plaintiff or Village officials committed fraud, misrepresentation, or error with respect to Kocek's salary. At the conclusion of discovery, Kocek moved for a permanent injunction, and the Board filed a motion to dissolve the preliminary injunction. The Circuit Court denied the Board's motion and entered a permanent injunction against the Board from altering, amending, or modifying Kocek's retirement benefits, finding that the Pension Board lacked jurisdiction because of the expiration of the thirty-five (35) day time limit provided for under Administrative Review Law. The Pension Board appealed.

The focus of the Appellate Court on appeal was whether the Court improperly limited §3-144.2 of the Illinois Pension Code, to circumstances where the claimant committed fraud or misrepresentation. Rather, it was the Pension Board's contention that the Village officials had allegedly committed fraud or misrepresentation when it awarded Kocek greater retirement benefits provided for under the Village ordinance and based upon a salary that did not go into effect until after he retired. The Appellate Court agreed with the Trial Court and found that the Pension Board lacked jurisdiction because it failed to verify the accuracy of salary amounts prior to its May 17, 2006 board meeting, in which it increased Kocek's retirement pension benefits. Never mind the fact that the information concerning discrepancies was not made available to the Board until November of 2006.

The Court rejected the Pension Board's arguments that the salary increase was not authorized by Village ordinance, but was rather an unilateral decision of the Village Manager to reward plaintiff Kocek for his years of service to the Village, and that the Kocek's retirement increases were significantly greater that the other three Commanders. Interestingly, the Court rejected an opinion from the Illinois Department of Financial and Professional Regulation in which it concluded that the increase to Kocek should not be considered salary attached to rank for pension purposes. Accordingly the Trial Court affirmed the entry of a permanent injunction. It is important to note that the Pension Board believed it

had the authority to at least conduct hearings to investigate whether the Village officials engaged in fraud or misrepresentation, not Kocek.

Justice Garcia issued a well reasoned dissenting opinion. Justice Garcia did not agree that the Pension Board should be enjoined from conducting a hearing to determine whether fraud, misrepresentation or error occurred. Rather, Justice Garcia believed that the Board did have the statutory authority to conduct a hearing to determine whether there was fraud, misrepresentation or error. However, only upon a finding of fraud, misrepresentation or error by someone, could the Board have the authority under §3-144.2 of the Pension Coded deduct for any overpayment.

V.

PENDING CASES TO WATCH

A. Randich et al. v. Lockport Township Firefighters Pension Board, Case No. 10 MR 498, (Circuit Court Will County, May 19, 2010). The four participants and beneficiaries of the Pension Fund brought a two count complaint against the Firefighters' Pension Fund based on two grounds. First, for administrative review of a pension board's decision granting retirement benefits to the Fire Chief, and second, alleging the Board breached its fiduciary duty when it failed to seek repayment of retirement benefits paid to the retired chief, while he served in a civilian capacity as "Chief Administrator." The Illinois Department of Insurance rendered an advisory opinion that while working in the civilian position as Chief Administrator, he had reentered active service within the meaning of

§5/4-117 of the Illinois Pension Code. According to the DOI, the retired chief's benefits should have been suspended, because he was in service.

This is an interesting case, stay tuned.

B. Oehlerking v. Gurnee Police Pension Board, et al., Case No. 08 L 944, Circuit Court of Lake County. Plaintiff, a female police officer has brought a multi-count complaint against the Gurnee Police Pension Board, the Village of Gurnee, the Pension Board's Attorney, and Pension Board Trustees in their individual capacity, alleging violations of 42 USC §1983 – violation of equal protection, HIPPA, and conspiracy to violate Plaintiff's civil rights, 42 USC §1985(3) - violation of right to privacy, and 42 USC §1983 – due process violations. Plaintiff had applied for a line of duty disability benefit, which was ultimately granted. The Pension Board sought to have a fourth physician evaluate the Plaintiff for purposes of her initial disability application, and it is alleged that officials disclosed confidential medical records. Yet another interesting case, stay tuned.