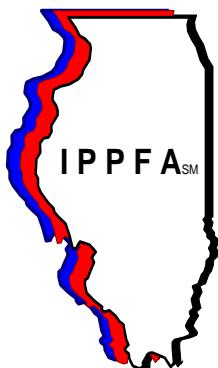


# **POLICE PENSION TRUSTEE HANDBOOK**



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## **FOREWORD**

Since its inception the IPPFA has considered the following among its stated purposes: (1) providing information, education and training to Illinois public pension trustees, (2) to study and report upon continuing developments in the law affecting the pensions of police officers and firefighters in the State of Illinois, (3) representing the interests of police and firefighter pension boards and pension funds throughout the State of Illinois.

The IPPFA achieves the above goals in part, through the publication of books such as the *Police Pension Trustee Handbook*. Over the years our organization has built a library of publications designed to aid public pension trustees in carrying out their duties and responsibilities and understanding that very complex legislation known as the Illinois Pension Code. The IPPFA has tried to accomplish two primary objectives in its pension law publications. These are: (1) to ensure that each book is of significant benefit to firefighter and police pension board trustees, public officials and legal counsel, and (2) to analyze and discuss the Illinois Pension Code in a professional, understandable and nonpartisan manner. Hopefully, after you have used this publication you will agree that we have met these objectives.

James M. McNamee  
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October, 2011

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## **PREFACE**

This is the Seventh Edition of the *Police Pension Trustee Handbook*. As with past editions, this handbook is intended as a quick reference to the Illinois Pension Code as it relates to the pensions of police officers in the State of Illinois covered under Article 3. In addition to an analysis of Article 3, this book also discusses Article 1 and Article 1A, as they related to police pension funds. Over three hundred and fifty cases relevant to Article 3 pension funds are analyzed in the pages that follow.

This publication has been re-formatted and expanded. New chapters have been added on the following topics: creditable service (ch. 4), loss or reduction of pension benefits (ch. 10), QILDRO proceedings (ch. 12), the Open Meetings Act (ch. 13), the Freedom of Information Act (ch. 14) and trustee training and ethics (ch. 17). In addition, the publication discusses recent amendments to the Pension Code, which creates a two-tiered pension system as well as recent judicial developments.

In spite of the information contained in this book, it is emphasized that the Illinois Pension Code is a very complex piece of legislation. It is advised that any person or pension board trustee who has questions concerning the Illinois Pension Code should contact legal counsel that are experience in this area of law.

The authors also want to acknowledge the guidance and support of the IPPFA, particularly Jim McNamee. Without the IPPFA, publication and distribution of the *Police Pension Trustee Handbook* would not have been possible.

Finally, this handbook is not intended to be the ultimate word on Illinois law relating to police pension boards. The book attempts to analyze and discuss the Pension Code based upon the knowledge and experience of the authors. It is our hope that this handbook will provide guidance and assistance to police pension trustees in performing their very important functions.

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Libertyville, Illinois  
October, 2011.

## **POLICE PENSION TRUSTEE HANDBOOK**

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## **POLICE PENSION TRUSTEE HANDBOOK**

### **CHAPTER 1**

#### **THE ILLINOIS PENSION CODE**

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## **CHAPTER 1**

### **THE ILLINOIS PENSION CODE**

#### **A. §1.1 INTRODUCTION**

The present law concerning Illinois public employee pensions is contained in what is referred to as the Illinois Pension Code.<sup>1</sup> The law is found in Chapter 40 of the Illinois Compiled Statutes. A reference or citation to a section of the Pension Code is automatically a reference to Chapter 40. The present pension law, which became effective July 1, 1963, centralized and replaced various other segments of Illinois laws relating to pensions of public employees. The Pension Code is a very complex piece of legislation which is constantly being changed through statutory amendments and judicial interpretation.

The Illinois Pension Code is divided into different articles and chapters dealing with different types or categories of pensions. This Handbook deals primarily with Article 3 of the Code which is entitled: Police Pension Fund – Municipalities 500,000 And Under. This section of the Pension Code covers every municipal police pension fund in Illinois, other than the City of Chicago.

#### **B. §1.2 PURPOSE OF PENSION LAWS**

The Illinois pension laws serve a number of purposes. One court has indicated that the legislative purpose of public pension funds is to stimulate governmental efficiency by encouraging continued and loyal public service.<sup>2</sup> It has also been held that public pension funds were created to provide for the payment of retirement and disability benefits to disabled and retired police officers and their beneficiaries.<sup>3</sup> Such laws presumably allow municipalities to attract better employees, to reduce

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<sup>1</sup> Illinois Compiled Statutes, 40 ILCS 5/1-101, *et seq.* Formerly the Illinois Revised Statutes, Chapter 108-1/2, §1-101, *et seq.*

<sup>2</sup> Crowley vs Retirement Board of Chicago, 70 Ill.App.3d 723, 388 N.E.2d 1015, 27 Ill.Dec. 52 (1979).

<sup>3</sup> Firemen's Annuity and Benefit Fund vs Municipal Employees' Officers and Officials' Annuity and Benefit Fund of Chicago, 219 Ill.App.3d 707, 579 N.E.2d 1003, 162 Ill.Dec. 189 (1991).

turnover, to facilitate the orderly retirement of older employees, to retain valuable employees who might seek more productive employment elsewhere and to assure a level of income that allows a retiree and his family to live in reasonable security.<sup>4</sup> A pension has also been defined as an allowance paid out of the public treasury to individuals or their representatives based upon valuable or meritorious services rendered or the satisfaction of certain conditions, such as age, term of service, or loss sustained while in public service.<sup>5</sup> Thus, the basic function of Article 3, as well as all other Illinois public pension legislation, is to provide pension and disability benefits to persons who are eligible to receive such benefits and to provide statutory protection of those benefits. Public pension funds in Illinois are considered contracts between the fund participants and the pension fund.<sup>6</sup>

Pension laws are deemed to be beneficial in nature.<sup>7</sup> The Illinois appellate courts have indicated that the pension laws governing disability, pension and death benefits for participants and beneficiaries serve purposes equivalent to workers' compensation laws.<sup>8</sup> The Pension Code sets up a method for funding pensions and establishes standards of conduct for pension board fiduciaries and trustees. The Pension Code in Article 3 also provides for disability and pension benefits for police officers and certain family members and establishes procedures for regulation, legal remedies and access to the courts.

#### C. §1.3 GOVERNING LAW

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<sup>4</sup> Cohn, Public Employee Retirement Plans - The Nature Of The Employees' Rights, 1968 U of I Law Forum 32, 40 (1968).

<sup>5</sup> Patterson vs City of Granite City, 78 Ill.App.3d 821, 397 N.E.2d 237, 331 Ill.Dec. 904 (1979); City of Duncan vs Bingham, 394 P.2d 456 (Oklo. 1964).

<sup>6</sup> Gualano vs City of Des Plaines, 139 Ill.App.3d 456, 487 N.E.2d 1050, 94 Ill.Dec. 173 (1985); Firemen's Annuity and Benefit Fund vs Municipal Employees' Officers' and Officials' Annuity and Benefit Fund, *supra*.

<sup>7</sup> Colton vs Board of Trustees, 287 Ill. 56, 122 N.E. 73 (1919); Saffold vs Retirement Board, 192 Ill.App.3d 827, 549 N.E.2d 671, 140 Ill.Dec. 20 (1989).

<sup>8</sup> Mitsuuchi vs City of Chicago, 125 Ill.2d 489, 532 N.E.2d 830, 127 Ill.Dec. 1 (1988); Sweeney vs City of Chicago, 131 Ill.App.2d 537, 266 N.E.2d 689 (1971).

The provisions of the Illinois Pension Code dealing with police pension funds, as well as the other articles of the Code pertaining to various categories of public employee pensions, all contain provisions covering the following general areas:

- (a) definitions;
- (b) types of pensions or benefits;
- (c) eligibility for pensions;
- (d) determination of pension rights;
- (e) reduction or loss of benefits;
- (f) funding and contributions;
- (g) creation of fiduciaries;
- (h) powers and duties of fiduciaries;
- (i) judicial review of administrative decisions.

Article 3 of the Pension Code, which pertains to police pension funds in the State of Illinois, presently contains approximately eighty sections. In addition, the provisions of Article 1 and 1A are applicable to police pension funds. Most of these sections are analyzed in the pages that follow. In addition to the Illinois pension statutes, the Illinois Department of Insurance has promulgated administrative regulations that pertain to and govern public pension funds.<sup>9</sup> These regulations are discussed in greater detail in Chapter 15.

Unfortunately, for both pension trustees and attorneys, the Illinois Pension Code is not an easy piece of legislation to understand. Many of the Pension Code's provisions are poorly written, confusing and even outdated. Some of the more important provisions of the law have not been construed by the courts. A complete re-codification of the Illinois Pension Code would be helpful to everyone concerned with this law.

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<sup>9</sup> Under Section 22-501.1 of the Code, the Director of Insurance can promulgate reasonable rules and regulations as may be necessary for and implementing the provisions of the Pension Code.

The constitutionality of public pension laws have been upheld for many years. The rationale being that pension benefits are in the nature of compensation for services previously rendered by public employees for which full and adequate compensation was not received at the time such services were rendered.<sup>10</sup>

**D. §1.4 CONSTITUTIONAL PROVISIONS**

The pension rights of police officers under Article 3 are guaranteed and protected under the Illinois Constitution. Article XIII, §5 of the Illinois Constitution of 1970 provides in pertinent part:

Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired. Ill.Const. Art. XIII, §5 (1970).

After the effective date of the Illinois Constitution, this "contractual relationship" is governed by the terms of the Pension Code at the time that the employee becomes a member of the pension fund.<sup>11</sup> This constitutional provision provides an important protection to participants and beneficiaries of Article 3 police pension funds. Once a person is admitted into the pension fund, his or her rights vest at that time and the benefits established under the Pension Code then in effect cannot be altered by new legislation that would adversely affect that individual.<sup>12</sup> However, this constitutional protection is limited. The Illinois Supreme Court has ruled that section 5 of the article XIII of the Illinois

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<sup>10</sup> People ex rel. Kroner vs Abbott, 274 Ill. 380, 113 N.E. 696 (1916); Hughes vs Trolger, 264 Ill. 612, 106 N.E. 431 (1914).

<sup>11</sup> Kerner vs State Employees' Retirement System, 72 Ill.2d 507, 382 N.E.2d 243, 21 Ill.Dec. 897 (1978).

<sup>12</sup> Gualano vs. City of Des Plaines, 139 Ill.App.3d 456, 487 N.E.2d 1050, 94 Ill.Dec. 173 (1985); Schroeder vs. Morton Grove Police Pension Board, 219 Ill.App.3d 697, 579 N.E.2d 997, 162 Ill.Dec. 183 (1991).

Constitution only protects pension benefits, not contractual rights.<sup>13</sup> Thus, the Pension Code can be amended in areas such as funding, because such amendments do not impact upon the right to receive pension benefits, according to the Illinois Supreme Court. This decision limits the scope of Illinois Constitution's public pension protection.

**Comment [1]:** \* McNamee vs State of Illinois, 173 Ill2d. 433, 672 N.E.2d 1159 (1996).

## E. **§1.5 PENSION CODE PROVISIONS**

The Illinois Pension Code is presently divided into twenty-four different chapters or articles dealing with the pension systems of various groups and categories of public employees throughout the State of Illinois. Some of the public employees covered include: members of the legislature,<sup>14</sup> firefighters,<sup>15</sup> police officers,<sup>16</sup> municipal employees,<sup>17</sup> county employees,<sup>18</sup> state employees,<sup>19</sup> teachers<sup>20</sup> and judges.<sup>21</sup>

Also contained in the Code are chapters containing general provisions applicable to all pension funds. These general provisions can be found in Article 1, 1A and Article 20 through 22A of the Code. These general provisions, as they affect Illinois police pension boards, are also discussed in subsequent chapters. In construing the provisions of Article 3, the courts and pension boards can and do rely on analogous provisions found in other chapters of the Pension Code.

### 1. **§1.6 DIFFERENCES AND SIMILARITIES OF VARIOUS ILLINOIS PENSION FUNDS**

<sup>13</sup> McNamee vs State of Illinois, 173 Ill2d. 433, 672 N.E.2d 1159, 220 Ill. Dec. 147 (1996).

<sup>14</sup> 40 ILCS 5/2-101, et seq.

<sup>15</sup> 40 ILCS 5/4-101, et seq., 40 ILCS 5/6-101, et seq.

<sup>16</sup> 40 ILCS 5/3-101, et seq., 40 ILCS 5/5-101, et seq.

<sup>17</sup> 40 ILCS 5/7-101, et seq., 40 ILCS 5/8-101, et seq.

<sup>18</sup> 40 ILCS 5/9-101, et seq.

<sup>19</sup> 40 ILCS 5/14-101, et seq.

<sup>20</sup> 40 ILCS 5/15-101, et seq., 40 ILCS 5/16-101, et seq.

<sup>21</sup> 40 ILCS 5/18-101, et seq.

As indicated in the section above, the Illinois Pension Code deals with a number of different and distinct pension funds. This book concerns itself primarily with police pension funds in municipalities of 500,000 and under. However, there are a number of similarities among the various Illinois public employee pension funds. As such, cases decided under similar provisions in other articles of the Illinois Pension Code can and should be used for guidance in construing the provisions of Article 3 of the Code. A judicial decision construing a similar provision under a different Article of the Illinois Pension Code can be used as a legal precedent under Article 3. The provisions of Article 5 dealing with Chicago Police Pension Board and Articles 4 and 6 dealing with firefighters' pension boards, contain similar and often identical language as contained in Article 3 and are often relied on by the courts in deciding Article 3 issues. Cases decided under these Articles are thus cited and referred to throughout this book as well.

In addition to the provisions of the Illinois Pension Code dealing with Illinois public employee pensions, there is a body of federal law relating to pensions of employees in private employment. This law is known as the Employment Retirement Income Security Act of 1974 (ERISA).<sup>22</sup> Many of the provisions of ERISA are identical or similar to the provisions of the Illinois Pension Code. Cases decided under ERISA also can be used in understanding and construing the provisions of Article 3.<sup>23</sup>

Most of the other forty-nine states also have statutes relating to police pension funds. On occasion, where there is no Illinois case law on a particular subject, the Illinois courts may rely on cases from other jurisdictions construing similar statutory provisions in other state pension codes.<sup>24</sup>

While there is no guarantee that the Illinois courts will always follow similar cases from other

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<sup>22</sup> 29 U.S.C. §1001, *et seq.*

<sup>23</sup> Where there is substantial similarity between state and federal law when construing state law, Illinois courts have relied on relevant federal case law. See, Montgomery Ward & Co. vs Fair Employment Practices Commission, 49 Ill.App.3d 796, 365 N.E.2d 535, 8 Ill.Dec. 297 (1979). For example, in Barrington Police Pension Fund vs Department of Insurance, 211 Ill.App.3d 698, 570 N.E.2d 622, 156 Ill.Dec. 146 (1991), the appellate court relied on cases decided under ERISA to determine that a pension board's investment policy was not imprudent.

<sup>24</sup> For example, the Illinois Supreme Court, in construing the disability provisions in the case of Johnson vs Retirement Board of the Policemen's Annuity and Benefit Fund, 114 Ill.2d 518, 502 N.E.2d 718, 104 Ill.Dec. 221 (1986), relied on cases from Louisiana, New Jersey and California in determining when a police officer is entitled to a duty-related disability. The cases relied on were: Blanchard vs New Orleans Police Department 210 So.2d 585 (La. 1968); Pollara vs Police and Firemen's Retirement System Trustees, 444 A.2d 616 (N.J. 1982).

jurisdictions, it is often beneficial to cite cases from other states in support of a pension board's decision.

**F. §1.7      VALIDITY AND CONSTRUCTION OF PENSION CODE PROVISIONS**

When the courts review decisions of pension boards or construe the provisions of the Illinois Pension Code, one of their duties is to determine the legislative intent and purpose behind the enactment of the statute.<sup>25</sup> When deciding cases involving the Illinois Pension Code, the courts apply certain rules of statutory construction. Police pension laws, as with all Illinois pension laws, are considered beneficial in nature.<sup>26</sup> Given the beneficial nature of such laws, the Illinois Pension Code is to be liberally construed by the courts in favor of those to be benefited.<sup>27</sup> Provisions of the Code are to be examined in their entirety in order to determine legislative intent.<sup>28</sup> However, the rule of liberal construction is only that – a rule of construction. If the intention of the Legislature is obvious from the language in the Pension Code, liberal construction is not applied and the courts will not be inclined to allocate any other meaning to the pension law other than what is plainly expressed in the statute.<sup>29</sup>

In construing the Illinois Pension Code, the courts must assume that the Legislature did not intend an absurd or unjust result.<sup>30</sup> For example, the Illinois Supreme Court held in *Herhold v.*

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<sup>25</sup> Peifer vs Board of Trustees, 57 Ill.App.3d 102, 372 N.E.2d 1106, 14 Ill.Dec. 827 (1978), Barrington Police Pension Fund vs Village of Barrington Ethics Board, 287 Ill.App.3d 614, 678 N.E.2d 671, 222 Ill.Dec. 799 (1997).

<sup>26</sup> Oak Brook Police Pension Fund vs Department of Insurance, 42 Ill.App.3d 155, 356 N.E.2d 171, 1 Ill.Dec. 171 (1976).

<sup>27</sup> Hahn vs Woodstock Police Pension Fund, 138 Ill.App.3d 206, 485 N.E.2d 871, 92 Ill.Dec. 825 (1985), Jahn vs City of Woodstock, 99 Ill.App.3d 206, 425 N.E.2d 490, 54 Ill.Dec. 625 (1981). While the courts favor liberal construction, pension benefits cannot be extended beyond the legislature's intent. Donnells vs Woodridge Police Pension Fund, 159 Ill.App.3d 735, 512 N.E.2d 1082, 111 Ill.Dec. 541 (1987).

<sup>28</sup> Oak Brook Police Pension Fund vs Department of Insurance, *supra*.

<sup>29</sup> Robbins vs. Carbondale Police Pension Board, 117 Ill.2d 533, 687 N.E.2d 39, 227 Ill. Dec. 116 (1997); Stec vs. Oak Park Police Pension Board, 355, Ill.App. 974, 824 N.E.2d 1138, 291 Ill.Dec. 880 (2005).

<sup>30</sup> People vs. Stepan, 105 Ill.2d 310, 473 N.E.2d 1300, 85 Ill. Dec. 495 (1985).

*Retirement Board of Fireman's Annuity and Benefit Fund*<sup>31</sup>, that fire paramedics were entitled to benefits as firefighters for the entire length of service, regardless of when contributions were made. Thus, benefits were awarded based upon both a liberal and common sense construction of the statute in that case.

When a provision of the Illinois Pension Code is ambiguous, the courts should look to similar statutes as an aid to construction.<sup>32</sup> The same words and phrases appearing in different sections of the statute are to be given a consistent meaning unless legislative intent to the contrary is clearly expressed.<sup>33</sup>

When reviewing pension board decisions the courts are often required to decide whether or not the pension board properly interpreted the Pension Code. While a court is not bound by a pension board's interpretation of the Pension Code, the board's interpretation is entitled to deference.<sup>34</sup>

One problem faced by attorneys representing police pension boards is the lack of precedent decisions issued by appellate courts. Because the Illinois Supreme Court limits the number of precedent opinions that can be issued by appellate courts, very few published decisions are issued each year dealing with legal issues under the Illinois Pension Code.

The amendments that became effective July 1, 1988 added section, §1-103.2, which allows new provisions in any amendment to be retroactive to any date specified in the bill. For example, the amendment to §4-109.1, which became effective July 1, 1988, has provisions making certain pension benefits retroactive as of July 1, 1987.<sup>35</sup> Thus, in construing amendments of the Pension Code, it is

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<sup>31</sup> 118 Ill.2d 436, 515 N.E.2d 1240, 113 Ill.Dec. 993 (1987).

<sup>32</sup> Di Falco vs. Wood Dale Firemen's Pension Fund, 122 Ill.2d 22, 521 N.E.2d 923, 118 Ill. Dec. 446 (1988); Kozak vs. Retirement Board of the Firemen's Annuity and Benefit Fund, 95 Ill.2d 211, 447 N.E.2d 394, 69 Ill. Dec. 177 (1983).

<sup>33</sup> Borg vs Schiller Park Police Pension Board, 111 Ill.App.3d 653, 444 N.E.2d 631, 67 Ill.Dec. 395 (1982).

<sup>34</sup> Wyckoff-Dike vs Peoria Police Pension Fund, 286 Ill.App.3d 655, 678 N.E.2d 4, 222 Ill.Dec. 597 (1997).

<sup>35</sup> 40 ILCS 5/4-109(e).

important to determine whether or not there are any statutory provisions that should be applied retroactively.

## 1. **§1.8 PREEMPTION**

The provisions of the Illinois Pension Code preempt and supersede conflicting municipal ordinances. Any conflict between a municipal ordinance and a state statute, such as the Illinois Pension Code, must be resolved in favor of the statute.<sup>36</sup> A municipality has no authority to supplement or change the requirements of an Illinois public pension fund.<sup>37</sup> Once a municipality elects to come under the Illinois Pension Code, that law is operative and controlling on the municipality.<sup>38</sup> Thus, any municipal ordinance or resolution that conflicts with any provision of the Illinois Pension Code is invalid.<sup>39</sup>

However, the appellate court has held that a municipal ordinance regulating the ethical conduct of pension board trustees was not preempted by the comprehensive provisions of the Pension Code nor by the language of the Code prohibiting home rule municipalities from altering or amending the Pension Code.<sup>40</sup> This case would seem to allow some municipal involvement in public pension fund administration.

## G. **§1.9 ARTICLE 1 PROVISIONS**

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<sup>36</sup> Village of Mundelein vs Hartnett, 117 Ill.App.3d 1011, N.E.2d 29, 73 Ill. Dec. 235 (1983).

<sup>37</sup> Billik vs Village of Brookfield, 80 Ill.App.3d 907, 400 N.E.2d 702, 36 Ill.Dec. 282 (1980).

<sup>38</sup> People ex rel. Schwerk vs. Municipal Retirement Fund, 6 Ill.2d 405, 128 N.E.2d 923 (1955).

<sup>39</sup> Billik vs Village of Brookfield, *supra*.

<sup>40</sup> Barrington Police Pension Fund vs Village of Barrington Ethics Board, 287 Ill.App.3d 614, 678 N.E.2d 671, 222 Ill.Dec. 799 (1997).

In addition to the provisions found in Article 3, a police pension fund is also governed by the general provisions found in Article 1 and 1A. As well as providing definitions under the Pension Code, Article 1 and 1A establish certain duties on trustees and sets forth the liabilities to be imposed upon trustees if those duties are breached. Article 3 specifically incorporates the provisions of Article 1.<sup>41</sup> Articles 1 and 1A of the Pension Code are discussed in greater detail in subsequent chapters of this book. In the event that there is a conflict between Article 1 of the Pension Code and Articles 3 or 4, the provisions of Articles 3 or 4 will prevail according to the Illinois Department of Insurance.<sup>42</sup>

**H. §1.10      SIGNIFICANCE OF PUBLIC  
EMPLOYEE PENSION FUNDS**

The scope and impact of Illinois public employee pension plans is significant both in terms of assets, benefits and individuals covered. Employees in the private sector have seen their pension benefits diminished and even abrogated. This will hopefully not occur to pension benefits vested under the Illinois Pension Code.

There are 638 public pension funds and retirement systems governed by the Illinois Pension Code. At the end of fiscal year 2008, there were 387,182 beneficiaries in these pension funds. As of the fiscal year ending 2008 Article 3 police pension funds had total assets of \$2,488,953,367.<sup>43</sup> In the fiscal year ending 2008 the amount of pension benefits paid for retirement pensions, disability pensions and survivors benefits was \$312,027,459.<sup>44</sup> The above numbers and dollars clearly illustrate the significance of Article 3 police pension funds and the importance of these funds' trustees.

**I. §1.11      PENSION REFORM**

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<sup>41</sup> 40 ILCS 5/3-149.

<sup>42</sup> Illinois Department of Insurance, Public Pension Division Policy Statement No. 92-1, (June 1992).

<sup>43</sup> 2009 Biennial Report of the Illinois Department of Insurance.

<sup>44</sup> Id.

For the past few years, much has been said and written concerning the reform of the Illinois public pension system. On December 30, 2010, a new pension law was put into effect creating a two-tiered pension system for Article 3 police pension funds. Because of the constitutional protections found in Article XIII §5 of the Illinois Constitution, the pension benefits of most police pension participants and beneficiaries remain unchanged. However, the pension benefits for police officers hired on or after January 1, 2011 will be reduced. This new two-tiered pension system is discussed in greater detail in Chapter 3.

#### **J.      §1.12            OTHER RESOURCES**

In addition to this publication, there are a number of other valuable resources that can provide information and guidance to police pension trustees. First and foremost, the IPPFA, the sponsor of this Handbook, presents seminars and holds an annual training conference. In addition, the IPPFA regularly publishes a newsletter dealing with issues of importance to pension trustees.

The website of the Illinois Department of Insurance, the governing agency over public pension funds, can also render advisory services to police pension boards on all matters pertaining to their operations.<sup>45</sup> The Department also maintains a toll-free number (800)-207-6958 for use by pension board trustees. The Division publishes an advisory services bulletin called *The Siren*, which provides updates as to recent legislative amendments to the Pension Code. The website DOI is:  
<https://insurance.illinois.gov/applications/pension/>.

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<sup>45</sup> 40 ILCS 5/1A-106.

## **CHAPTER 2**

### **TERMS AND DEFINITIONS RELATING TO POLICE PENSION FUNDS UNDER ARTICLE 3**

- A. §2.1 OVERVIEW
- B. §2.2 GENERAL DEFINITIONS
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  - 3. §2.6 PROHIBITED TRANSACTIONS
  - 4. §2.7 INVESTMENT ADVISOR
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- D. §2.11 ARTICLE 3 DEFINITIONS
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## **CHAPTER 2**

### **TERMS & DEFINITIONS RELATING TO POLICE PENSION FUNDS UNDER ARTICLE 3**

#### **A. §2.1 OVERVIEW**

The focus of this book centers upon Police Pension Funds under Article 3 of the Illinois Pension Code. The Illinois Pension Code creates in each municipality, as defined in Article 3 of the Code, a police pension fund for the benefit of that municipality's police officers, their

spouses, children and dependent parents.<sup>46</sup> The establishment of a police pension fund is mandatory for any Illinois city, village or town with more than 5,000 but less than 500,000 inhabitants.<sup>47</sup> Any Illinois city, village or town with less than 5,000 inhabitants may, by referendum, adopt the provisions of Article 3.<sup>48</sup> Article 3 of the Pension Code creates a pension board to administer and manage the activities of the pension fund.<sup>49</sup> The duties of pension board trustees are discussed in Chapters 6 through 10 of this book.

Municipalities covered under the provisions of Article 3 cannot change or alter the provisions of the Code, nor divest themselves from funding responsibility.<sup>50</sup> The home rule powers under the Illinois Constitution have no applicability to the provisions of Article 3.<sup>51</sup> A municipality thus cannot avoid or circumvent the Code's pension obligations to its participants by invoking home rule powers. It has been held that a municipality cannot pay supplemental pension benefits because such payments alter the provisions of the Illinois Pension Code and thus violate the home rule powers provision.<sup>52</sup> The Pension Code creates contractual rights.

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<sup>46</sup> 40 ILCS 5/3-101.

<sup>47</sup> *Id.*

<sup>48</sup> Under §3-145 of the Code, 40 ILCS 5/3-145, 5% of the legal voters from the last preceding general election may petition the municipality to submit the proposition that Article 3 of the Pension Code be adopted in the municipality. A majority of the votes cast on the proposition in favor of adoption makes Article 3 applicable to that municipality.

<sup>49</sup> 40 ILCS 5/3-128.

<sup>50</sup> Board of Trustees of the Village of Rosemont vs. Mathias, 109 Ill.App.3d 894, 441 N.E.2d 362, 65 Ill.Dec. 449 (1982). Billik vs. Village of Brookfield, 80 Ill.App.3d 907, 400 N.E.2d 29 36 Ill.Dec. 282 (1983).

<sup>51</sup> 40 ILCS 5/3-150. The purpose of this provision was to insure that public employees in Illinois receive uniform retirement and pension benefits. Sanders vs. City of Springfield, 130 Ill.App.3d 490, 474 N.E.2d 438, 85 Ill.Dec.710 (1985); Board of Trustees of the Village of Rosemont vs. Mathias, *supra*.

<sup>52</sup> City of DeKalb vs. International Association of Fire Fighters Local 1236, 182 Ill.App.3d 367, 538 N.E.2d 867, 131 Ill.Dec.492 (1989).

The Illinois Supreme Court in *Di Falco v. Wood Dale Firemen's Pension Fund*<sup>53</sup> reaffirmed the constitutional principle that a pension system is an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.<sup>54</sup> This contractual relationship is governed by the actual terms of the Pension Code at the time the individual becomes a member of the pension system.<sup>55</sup> Thus, in determining a person's rights under the Pension Code, reference must be made not only to the provisions presently in effect, but also to the provisions in effect when the person began participating in the police pension fund.

**B. §2.2        GENERAL DEFINITIONS**

In order to comprehend the many facets of Article 3 pension law there must first be an understanding of some of the basic definitions under the Pension Code. For the most part, these definitions are contained in Article 1, Article 3 and Article 22 of the Code. Some of the more important definitional provisions are set forth below.

**C. §2.3        ARTICLE 1 DEFINITIONS**

As indicated in the previous Chapter, Article 1 of the Pension Code contains a number of provisions which define certain terms that apply to all Illinois pension funds covered in the Illinois Pension Code.<sup>56</sup> Article 1 focuses on the general duties and responsibilities of Illinois public pension trustees. Among the terms defined are: fiduciary, party in interest, prohibited transactions, investment advisor and consultant.

**1.        §2.4 FIDUCIARY**

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<sup>53</sup> 122 Ill.2d 22, 521 N.E.2d 923, 118 Ill.Dec. 446 (1988).

<sup>54</sup> Ill.Const. 1970, Art. XIII §5.

<sup>55</sup> See, Sellards vs. Rolling Meadows Firemen's Pension Fund, 133 Ill.App.3d 415, 478 N.E.2d 1123, 88 Ill. Dec. 515 (1985); Kraus vs. Niles Police Pension Fund, 72 Ill.App.3d 833, 390 N.E.2d 1281, 28 Ill. Dec. 691 (1979).

<sup>56</sup> 40 ILCS 5/1-101.1.

One of the key definitions under the Code, at least as far as pension trustees are concerned, is the term fiduciary. Trustees of public pension funds are fiduciaries under the Illinois Pension Code. Under §1-101.2 of the Pension Code, a “Fiduciary” is any person who:

- (1) exercises any discretionary authority or discretionary control respecting management of the pension fund or exercises any authority or control respecting management or disposition of its pension fund assets;  
or
- (2) has any discretionary authority or discretionary responsibility in the administration of such retirement system;  
or
- (3) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such retirement system or pension fund, or has authority or responsibility to do so.<sup>57</sup>

This is a broad definition. Pension Board trustees are thus statutorily designated as fiduciaries. The term fiduciary also covers more than just pension fund trustees. Investment consultants and advisors for the pension board would also be considered fiduciaries. Third parties performing services for a pension board, such as attorneys, accountants or medical providers are normally not considered fiduciaries. In addition, persons who do not have any discretionary responsibilities and merely perform ministerial functions are not fiduciaries.

As a fiduciary, a pension trustee must perform his or her duties with respect to the fund solely in the interest of the participants and beneficiaries of that fund.<sup>58</sup> In that context, a trustee must act for the exclusive purpose of:

- (1) providing benefits to participants and beneficiaries; and
- (2) defraying reasonable expenses of administering the pension fund.<sup>59</sup>

These two provisions are somewhat of a contradiction since the granting of a pension benefit results in a greater expense to the fund. However, this is typical of the decisions a pension trustee must make.

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<sup>57</sup> 40 ILCS 5/1-102.2.

<sup>58</sup> 40 ILCS 5/1-109; Sedlock vs. Board of Trustees of the Ottawa Police Pension Fund, 367 Ill.App.3d. 526, 854 N.E.2d 748, 305 Dec. 156 (2006).

<sup>59</sup> 40 ILCS 5/1-109(a).

A pension trustee must also exercise his or her duties with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person familiar with such matters would use.<sup>60</sup> A pension trustee may also breach a fiduciary duty by failing to act with the appropriate standard of care as to a ministerial as well as a discretionary duty.<sup>61</sup> In summary, a trustee, as a fiduciary, has a great deal of responsibility and must act first and foremost in the interests of the participants and beneficiaries of the police pension fund.

## **2. §2.5 PARTY IN INTEREST**

The term “party in interest” is another important concept under the Illinois Pension Code. Almost anyone who deals with a pension fund, on a regular basis, is a party in interest. A person is a “party in interest” with respect to a pension fund if the person is:

- (1) a fiduciary, counsel or employee of the fund;
- (2) provides services to the fund;
- (3) the relative of a person providing services to the fund;
- (4) an employer whose employees are covered under the fund;
- (5) a union whose members are covered under the fund;
- (6) an officer or director of the fund.<sup>62</sup>

The Pension Code forbids certain transactions between a fiduciary and a party in interest. These transactions are generally referred to as “prohibited transactions.”

## **3. §2.6 PROHIBITED TRANSACTIONS**

Under the prohibited transaction provision in the Code, a fiduciary cannot cause the pension fund to engage in any transaction if the fiduciary knows or should know that the transaction constitutes a direct or indirect:

- (1) sale or exchange of fund property to a party in interest for  
**less than adequate consideration or from a party in interest for greater  
than adequate consideration;**

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<sup>60</sup> 40 ILCS 5/1-109(b).

<sup>61</sup> Illinois Attorney General Opinion No. 82-059 (1982).

<sup>62</sup> 40 ILCS 5/1-101.3.

- (2) lending money from the fund to a party in interest without adequate security and a reasonable rate of interest;
- (3) furnishing pension fund goods and services to a party in interest for less than adequate consideration or the purchase of products from a party in interest for more than adequate consideration;
- (4) transfer to or allow the use of fund assets by a party in interest for less than adequate consideration.<sup>63</sup>

A fiduciary or trustee is also prohibited from dealing with pension fund assets in his own interest or in any manner adverse to the interests of the fund participants and beneficiaries.<sup>64</sup>

However, a pension board trustee is allowed to receive any benefit he or she may be entitled to as a participant or beneficiary in the pension fund. In addition, a pension trustee is entitled to be reimbursed for any personal expenses incurred while conducting pension business.

The purpose of the prohibited transactions rule is to ensure that fiduciaries perform their duties and functions solely for the benefit of the pension fund and its members. Under this provision, a pension trustee is not entitled to directly or indirectly profit as a result of being a pension trustee.

#### **4. §2.7 INVESTMENT ADVISOR**

The term “investment advisor” is important because pension boards should use such advisers in the management and investment of fund assets. Under the Pension Code, a pension board may appoint investment advisors to assist the board in the investment of pension fund

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<sup>63</sup> 40 ILCS 5/1-110(a).

<sup>64</sup> 40 ILCS 5/1-110(b). The duties, liabilities and the indemnification of trustees are discussed in greater detail in Chapter 4.

assets. A pension board investing in common or preferred stock must appoint an investment advisor before making such investments.<sup>65</sup>

An investment advisor or manager is defined in the following manner:

- (1) is a fiduciary appointed in accordance with §1-109.1 of the Pension Code;
- (2) he or she has the power to control, acquire or manage pension fund assets;
- (3) has acknowledged that he or she is a fiduciary with respect to the fund;
- (4) is registered as an investment advisor under state or federal law.<sup>66</sup>

## **5. §2.8 CONSULTANT**

The term “consultant” under the Pension Code is defined as a person or entity retained by the pension board to make recommendations in developing investment strategy, assisting with selecting appropriate investment advisors or monitoring pension board investments.<sup>67</sup> Services that are not directly related to the investment of assets, such as legal counsel or actuaries are not included within this definition.<sup>68</sup>

## **6. §2.9 PLAN YEAR**

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<sup>65</sup> 40 ILCS 5/1-113.5(a).

<sup>66</sup> 40 ILCS 5/1-101.4.

<sup>67</sup> 40 ILCS 5/1-101.5.

<sup>68</sup> *Id.*

The term “plan year” means calendar or fiscal year on which the records of the pension fund are kept.<sup>69</sup>

## **7. §2.10 VESTED PENSION BENEFIT**

A “vested pension benefit” is now defined as an interest obtained by a participant or a beneficiary in an immediate or a deferred pension benefit arising from the participant’s service, which has not been forfeited under the Pension Code.<sup>70</sup>

## **D. §2.11 ARTICLE 3 DEFINITIONS**

In addition to the definitions of general applicability to all public pension funds found in Article 1 of the Illinois Pension Code, Article 3 has certain definitions that apply only to downstate police pension funds. These definitions are equally important in determining the rights and duties of pension board trustees and the fund’s participants and beneficiaries. The Article 3 definitions of importance are discussed in the following sections.

### **1. §2.12 MUNICIPALITY**

A municipality is defined under Article 3 as any city village or town with 5,000 to 500,000 inhabitants or a city, village or town under 5,000 which adopts Article 3 of the Pension Code by referendum.<sup>71</sup>

The municipality of each police department plays an important role in relation to police pension funds in Illinois. The municipality, through its mayor or president is allowed to have two trustees appointed to the pension board.<sup>72</sup> The municipality also plays a significant part in financing the police pension fund through the annual tax levy upon taxable property of the municipality.<sup>73</sup>

However, it must be remembered that the police pension fund is a separate and distinct legal entity from the municipality and neither the municipal officers nor the police department are to control the pension fund. The Pension Code specifically provides that a municipality that is a home rule unit has no power to alter, change or amend any of the provisions contained in Article 3.<sup>74</sup> Nor does the municipality have any right or authority to interfere in or influence the decisions of a police pension board other than through its appointed trustees.

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<sup>69</sup> 5 ILCS 1A-102.

<sup>70</sup> *Id.*

<sup>71</sup> 40 ILCS 5/3-103.

<sup>72</sup> 40 ILCS 5/3-128.

<sup>73</sup> 40 ILCS 5/3-125.

<sup>74</sup> *Id.*, 5/3-150, City of DeKalb vs. International Association of Firefighters' Local 1236, 182 Ill.App.3d 367, 538 N.E.2d 867 (1989).

## **2. §2.13 PARTICIPANT**

A “participant” under Article 3 is defined as a police officer, deferred pensioner or a beneficiary of the Pension Fund.<sup>75</sup> Thus, by definition a beneficiary of a police pension fund is also a participant of the fund.

## **3. §2.14 BENEFICIARY**

A person is a “beneficiary” under the Pension Code upon the receipt of benefits from the fund.<sup>76</sup> The term includes but is not limited to: retired pensioners, disabled pensioners, and their surviving spouses, minor children, disabled children and dependent parents.

## **4. §2.15 POLICE OFFICER**

Under Article 3 a police officer is entitled to certain pension benefits. A “police officer” is defined as:

- (1) any person appointed to the police force who is sworn and commissioned to perform police duties; and,
- (2) within three months after reappointment, makes written application to the board to come within the provisions of Article 3.<sup>77</sup>

In order to be a police officer under Article 3 the officer must be properly appointed and must make application to the fund within three months of appointment.<sup>78</sup> Failure to prove that a written application was made precludes admission into the fund and the receipt of benefits.<sup>79</sup> Probationary police officers, if otherwise eligible, are considered as police officers under this section.

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<sup>75</sup> 40 ILCS 5/3-108.2.

<sup>76</sup> 40 ILCS 5/3-108.3.

<sup>77</sup> 40 ILCS 5/3-106.

<sup>78</sup> See, Young vs Worth Police Pension Fund, 57 Ill.App.3d 689, 373 N.E.2d 708, 15 Ill.Dec. 362 (1978); People ex rel. Gasparas vs Village of Justice, 88 Ill.App.2d 227, 231 N.E.2d 669 (1967).

<sup>79</sup> Donnells vs Woodridge Police Pension Board, 159 Ill.App.3d 1082, 512 N.E.2D 1082 (1987). In Donnells, a police officer who was given the opportunity but failed to join the fund and make contributions within the period of time provided by the Pension Code, was ineligible to join the fund at a later date.

Certain classifications are specifically excluded under Article 3 from the term police officer. Individuals working in the following positions are thus not eligible to become participants a police pension fund:

- (a) part-time police officers;
- (b) special police officers;
- (c) night watchmen;
- (d) temporary employees;
- (e) traffic guards;
- (f) auxiliary police officers;
- (g) municipal parking lot attendants;
- (h) clerks or civilian employees who perform clerical duties exclusively; and
- (i) any police officer failing to make his statutory contributions.
- (j) any person who has elected to participate in the Illinois Municipal Retirement Fund (IMRF), unless the election has been rescinded.<sup>80</sup>

The fact that a person is a police officer at one point in time does not mean that there is a permanent entitlement to benefits. The Illinois Supreme Court has held that in order to receive a disability benefit, a person must fall within the statutory definition of police officer at the time of impairment and at the time of application.<sup>81</sup> In that case, a probationary fireman was allegedly injured while on duty. After his injury the fire department revoked his probationary status and advised Mr. DiFalco that he was no longer considered a member of the fire

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<sup>80</sup> 40 ILCS 5/3-109.

<sup>81</sup> DiFalco vs. Wood Dale Firemen's Pension Fund, 122 Ill.2d 22, 521 N.E.2d 923, 118 Ill.Dec. 446 (1988).

department. About one year after his discharge, DiFalco submitted an application for a duty related disability benefit. The pension board dismissed the application as untimely. DiFalco then sued the pension board seeking disability benefits.

**The trial court upheld the pension board's decision ruling that in order to qualify for a duty-related disability pension an individual must be a "firefighter" as that term is used in the Illinois Pension Code at the time of filing for the disability pension. The Illinois Supreme Court re-affirmed the decision of the Wood Dale Firemen's Pension Fund.**

**The supreme court's analysis began by noting that the issue in the case was whether the term "fireman" [or "police officer"] is operative at the time of the disability as well as at the time of the application for disability benefits. The court answered that question by holding that the purpose of a duty-related disability pension is to help provide benefits only for covered parties (and their spouses and children) who, if not for the disability would still be employed and drawing regular salary.<sup>82</sup> The court went on to state that the purpose of a duty-related disability pension would not be served by granting a disability pension to an applicant who is no longer employed because he has been discharged.**

According to *DiFalco*, disability pensions are to be given only to participants who would still be employed if not for their disability. To receive a disability pension a person must not have been discharged prior to his application for disability benefits. The supreme court's ruling

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<sup>82</sup> 521 N.E.2d at 925.

in *DiFalco* illustrates how important definitions are under the Pension Code. Failure to fall within the definition of those eligible to receive benefits precludes the receipt of such benefits.

#### **5. §2.16 DEFERRED PENSIONER**

Under Article 3 a “deferred pensioner” is as defined as a police officer who has retired having enough creditable service to qualify for a pension but who has not attained the required age.<sup>83</sup>

#### **6. §2.17 CHILD OR CHILDREN**

A police officer's children are beneficiaries under the Act and entitled to certain benefits. The term children includes natural as well as legally adopted children.<sup>84</sup> As of January 1, 1986, children born out of wedlock are entitled to the same benefits as other children, provided paternity is established.<sup>85</sup>

#### **7. §2.18 SPOUSE**

**The term spouse is not specifically defined under Article 1 or Article 3. A spouse is a beneficiary and entitled to benefits in certain instances, which are discussed in subsequent chapters.**

#### **8. §2.19 DEPENDANT PARENTS**

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<sup>83</sup> 40 ILCS 5/3-105.1.

<sup>84</sup> 40 ILCS 5/3-108. Adopted children are eligible for benefits only if the judicial proceedings for adoption were commenced at least one year prior to the death, disability or the attainment of age 50 of the police officer.

<sup>85</sup> 40 ILCS 5/1-104.2. Paternity can be established by acknowledgment of the father, adjudication before or after the death of the father or any other evidence accepted by the pension board trustees.

A dependent parent is also entitled to benefits in certain situations where there is no surviving spouse or dependent children. A "dependent parent" is defined under Article 3 as a parent who furnishes proof to the pension board that the deceased police officer was the sole means of support of the parent or that the parent was the dependent of the deceased police officer for federal income tax purposes.<sup>86</sup>

#### **9. §2.20 CREDITABLE SERVICE**

Creditable service is the time served by the police officer pension fund participant as a member of the municipality's police department.<sup>87</sup> The definition of creditable service is important because it determines eligibility for retirement. The computation and transferability of creditable service is discussed in Chapter 4.

#### **10. §2.21 SELF MANAGED PLAN**

The self-managed plan is a defined contribution retirement program recently established for certain eligible police officers.<sup>88</sup> It includes retirement and disability benefits but does not include retirement annuities, death benefits or survivors insurance benefits. The self-managed plan is intended to provide a defined contribution plan for eligible police officers who do not

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<sup>86</sup> 40 ILCS 5/3-108.1.

<sup>87</sup> 40 ILCS 5/3-110(a).

<sup>88</sup> 40 ILCS 5/3-105.2.

elect to participate in the defined benefit plan currently established under Article 3.<sup>89</sup> This legislation is currently dormant.

**E. §2.22 OTHER DEFINITIONS**

A number of important pension terms are not defined in either Article 1 or Article 3. Some of these terms are discussed in the sections that follow.

**1. §2.23 ACT OF DUTY**

One important definition relating to Article 3 is the phrase "act of duty" under the duty disability pension provisions in 40 ILCS 5/3-114.1. The term is not defined in Article 3. However, the Illinois Supreme Court has held that even though the phrase is not defined in Article 3, the definition of "act of duty" in Article 5 of the Pension Code applying to the Chicago Police Pension Fund should be applied in Article 3 cases.<sup>90</sup> That definition states:

"Act of Duty. 'Act of duty': Any act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State or by the ordinances or police regulations of the city in which this Article is in effect or by a special assignment; or any act of heroism performed in the city having for its direct purpose the saving of the life or property of a person other than the policeman."<sup>91</sup>

Under the above definition, in order to receive a line of duty disability pension, the police officers disability must result from a special risk not ordinarily assumed by citizens in ordinary walks of life. A complete analysis of the disability pension procedures under Article 3 is contained in Chapter 9.

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<sup>89</sup> 40 ILCS 5/3-109.3.

<sup>90</sup> Robbins vs Carbondale Police Pension Fund, 177 Ill.2d 533, 687 N.E.2d 39, 227 Ill.Dec. 116 (1997).

<sup>91</sup> 40 ILCS 5/5-113.

## **2. §2.24 DEFINED BENEFIT PLAN**

The pension benefit provisions currently in effect in Article 3 of the Illinois Pension Code are what is known as a defined benefit plan. A defined benefit plan focuses on the amount of benefits payable from the plan. In other words, the benefits are guaranteed. The municipality's minimum contribution each year is determined by an actuary who calculates the amount that needs to be contributed so that the pension fund will have enough money to pay the promised benefits when they become due. Thus, a defined benefit plan makes a promise, not as to the amount that will be contributed, but as to the benefits that will be paid.

Unlike the defined contribution plan, the risk of investment gain or loss is with the employer (under Article 3, the municipality), rather than the police officer. Under a defined benefit plan, the amount of the employee's pension benefits is not dependent upon the performance of the pension fund's investments.

## **3. §2.25 DEFINED CONTRIBUTION PLAN**

Under a defined contribution plan, the focus is on the amount to be contributed each year. However, no promise is made as to the amount that will be paid out of the pension fund to the participant. Under a defined contribution plan an account is established for each participant in the plan. The risk of investment gain or loss is with the participant not the employer. The new self-managed plan provisions, though not in use, under 40 ILCS 5/3-109.3 establish a defined contribution plan.

## **4. §2.26 ACTUARIAL ASSUMPTIONS**

Actuarial assumptions are the factors used by the actuary in forecasting or predicting uncertain future events that affect pension fund cost. They normally involve such items as interest on investment earnings, salary increases, mortality rates and turnover. Actuarial assumptions are the key in determining the municipality's annual pension contribution amounts.

## **5. §2.27 PENSION BENEFIT**

The rights that a pension fund participant or beneficiary has to monetary payments from the police pension fund depends upon meeting the eligibility requirements under Article 3 of the Illinois Pension Code. Pension Benefits usually refer to monthly payments payable on retirement or proof of disability.

## **6. §2.28 EQUITIES**

Equities refer to the pension board's investment in or ownership of common stock, as distinguished from fixed income investments such as bonds or mortgages.

## **7. §2.29 PORTFOLIO**

The makeup of the pension fund's investments, such as bonds, stocks and mortgages.

## **8. §2.30 PORTABILITY**

Portability is generally defined as the right of a pension fund participant to take with him or her after leaving the police department an amount of money consisting of the officer's contributions.

#### **9. §2.31 GOVERNMENTAL PLAN**

Public pension plans, such as police pension funds under Article 3 of the Illinois Pension Code are exempt from coverage under ERISA as governmental plans. A "governmental plan" is defined as: A plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.<sup>92</sup>

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<sup>92</sup> 29 U.S.C. §1002 (32).

## **CHAPTER 3**

### **TYPES OF PENSIONS UNDER ARTICLE 3**

- A. §3.1 INTRODUCTION
- B. §3.2 ARTICLE 3 BENEFITS
- C. §3.3 TWO-TIERED PENSION SYSTEM
  - 1. §3.4 CREDITABLE SERVICE
- D. §3.5 TIER ONE RETIREMENT PENSIONS
- E. §3.6 TIER TWO RETIREMENT PENSIONS
  - 1. §3.7 REDUCED PENSION INCREASES
- F. §3.8 RETIREMENT PENSION INCREASES
- G. §3.9 DISABILITY PENSION BENEFITS
  - 1. §3.10 LINE-OF-DUTY DISABILITY BENEFITS
  - 2. §3.11 NOT-IN-DUTY DISABILITY BENEFITS
- H. §3.12 SURVIVORS' PENSION BENEFITS
  - 1. §3.13 BENEFITS TO THE SURVIVING SPOUSE
  - 2. §3.14 BENEFITS TO DEPENDENT CHILDREN
  - 3. §3.15 BENEFITS TO DEPENDENT PARENTS
- I. §3.16 MINIMUM PENSION BENEFITS
- J. §3.17 ELIGIBILITY FOR PENSION BENEFITS
- K. §3.18 REFUND OF CONTRIBUTIONS
- L. §3.19 RE-ENTRY INTO ACTIVE SERVICE
- M. §3.20 SELF-MANAGED PLANS

## **CHAPTER 3**

### **TYPES OF PENSIONS UNDER ARTICLE 3**

#### **A. §3.1 INTRODUCTION**

This Chapter reviews the pension benefits that may be received by participants and beneficiaries under Article 3 of the Illinois Pension Code. Article 3 creates a board of trustees for each downstate

police officer's pension fund.<sup>93</sup> Among the major functions of pension board trustees, is the determination of who is entitled to pension benefits and what type of pension benefits, if any, should be paid to a participant or beneficiary. A pension benefit has been defined as a state allowance paid out of the public treasury to individuals or their representatives based upon valuable or meritorious services rendered or the satisfaction of certain conditions such as age or term of service, or damages sustained while in public service.<sup>94</sup> The primary object of a pension is to induce efficient, conscientious and honorable service.<sup>95</sup>

In its simplest form, a pension is a regular payment, usually monthly, to a person who is no longer employed as a police officer because of age, years of service, disability or any combination of the above. The decision of pension board trustees to either grant or deny pension benefits can have far-reaching effects on the fund, the police officer and his or her family.

## **B. §3.2        ARTICLE 3 BENEFITS**

The current pension system set out in Article 3 of the Pension Code is what is referred to as a defined benefit plan. In a defined benefit plan, there is a definite formula by which the participants' pension benefits are measured and the benefits are guaranteed. Under this Article 3 defined benefit plan, there are three basic types of benefits paid to police officers, their participants and beneficiaries. These benefits can be categorized as follows:

- (1) retirement pension benefits<sup>96</sup>
- (2) disability pension benefits<sup>97</sup>

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<sup>93</sup> 40 ILCS 5/3-128. This powers of the pension board are discussed in Chapter 5 of this book. Duties and liabilities are examined in Chapter 6.

<sup>94</sup> Patterson vs. City of Granite City, 78 Ill.App.3d 821, 397 N.E.2d 237, 33 Ill.Dec. 904 (1979); City of Duncan vs. Bingham, 394 P.2d 456 (Okla . 1964).

<sup>95</sup> Patterson vs. City of Granite City, *supra*; People ex rel. Judges Retirement System vs. Wright, 379 Ill.328, 40 N.E.2d 719 (1942).

<sup>96</sup> 40 ILCS 5/3-111.

<sup>97</sup> 40 ILCS 5/3-114.1, 5/3-114.2.

(3) survivors' pension benefits<sup>98</sup>

The adjudication of claims for these benefits is examined in greater detail in Chapter 9.

**C. §3.3        TWO-TIERED PENSION SYSTEM**

Effective January 1, 2011, there is now a two-tiered pension system for Article 3 police pension boards.<sup>99</sup> The new law creates a different retirement pension benefit structure for police officers hired on or after January 1, 2011.

The new law does not and cannot affect the pension benefits of police officers who were participants in an Article 3 pension fund prior to January 1, 2011. The reason for this protection is that a police officer under Article 3 or any other public employee entitled to pension benefits under the Pension Code, acquired a contractual right to the benefits of the pension system in force when the officer became a member of the fund.<sup>100</sup> Thus, a pension participant under the Code is entitled to a pension based upon the status of the pension system when his rights in the system are vested.<sup>101</sup> Under the protection accorded by the Illinois Constitution,<sup>102</sup> the vested pension benefits of police officers cannot be diminished or impaired. Thus, only the pension benefits of newly hired police officers can be reduced by this new legislation.

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<sup>98</sup> 40 ILCS 5/3-112, 5/3-122.

<sup>99</sup> Senate Bill 3538 passed by the Illinois General Assembly on December 2, 2010, signed on December 30, 2010.

<sup>100</sup> Kuhlmann vs. Maywood Police Pension Board, 108 Ill.App.3d 603, 435 N.E.2d 1307, 62 Ill.Dec. 340 (1982); Kraus vs. Niles Police Pension Fund, 72 Ill.App.3d 833, 390 N.E.2d 1281 (1979); DiFalco vs. Wood Dale Firemen's Pension Fund, 122 Ill.2d 22, 521 N.E.2d 923, 118 Ill.Dec. 446 (1988).

<sup>101</sup> DiFalco vs. Wood Dale Firemen's Pension Fund, *Id.*; Greves vs. Firemen's Pension Fund, 147 Ill.App.3d 956, 498 N.E.2d 618, 101 Ill.Dec. 294 (1986).

<sup>102</sup> Kraus vs. Niles Police Pension Board, 72 Ill.App.3d 833, 390 N.E.2d 1281 (1979).

The retirement benefits of police officers whose pension entitlements were vested prior to 2011 (Tier One) and the pension benefits of police officers hired on or after January 1, 2011(Tier Two) are discussed at length in the subsequent sections of this Chapter.

**1.     §3.4    CREDITABLE SERVICE**

Both Tier One and Tier Two retirement pensions under Article 3 of the Pension Code are determined by age and creditable service. The term creditable service means the time employed as a member of the police force in the municipality.<sup>103</sup> What time is counted as creditable service and how creditable service may be transferred or increased are discussed in the following Chapter.

**D.     §3.5       TIER ONE RETIREMENT PENSIONS**

A police officer who is a participant of a police pension fund under Article 3 is entitled to a retirement pension under the following circumstances:

(1) A police officer age 50 or more with 20 years or more of creditable service who is no longer in service as a police officer is entitled to a pension of one-half (½) of the salary attached to his rank on the police force for one year immediately prior to retirement. The amount of pension is increased for 2.5% per year for each of service up to thirty years to a maximum of 75% of the officer's salary.<sup>104</sup>

(2) An officer retired by law mandatorily due to age with at least 8 but less than 20 years of service is entitled to a pension equal to 2.5% of the salary attached to his rank for one year immediately prior to retirement for each year of creditable service.<sup>105</sup>

(3) An officer who voluntarily retires or is separated from service with at least 8 but less than 20 years of creditable service, not applying for a refund upon separation, is entitled to

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<sup>103</sup> 40 ILCS 5/3-110(a).

<sup>104</sup> 40 ILCS 5/3-110(a).

<sup>105</sup> 40 ILCS 5/3-110(b).

receive a pension at the age of 60 equal to 2.5% of the salary attached to his rank for one year immediately prior to retirement for each year of creditable service.<sup>106</sup>

**E. §3.6        TIER TWO RETIREMENT PENSIONS**

The amendments to Article 3 of the Pension Code, change the retirement pension benefits for police officers hired on or after January 1, 2011. The minimum retirement age is no longer 50 but is now 55. A minimum of 10 years creditable service is now required, rather than 8 years creditable service. A police officer who first becomes a participant in an Article 3 police pension fund as of January 1, 2011, is entitled to a retirement pension under the following circumstances;

(1) A police officer age 55 or more with 10 or more years of creditable service is entitled to a pension computed by multiplying 2.5% for each year of service by his or her final average salary, up to a maximum of 75% of the final average salary.<sup>107</sup> The term “final average salary” means the average monthly salary obtained by dividing the total salary of the police officer during the 96 consecutive months of service within the last 120 month of service in which the total salary was the highest, by the number of months of service during that period.<sup>108</sup>

As of January 1, 2011, the annual salary for which retirement pension benefits are computed cannot exceed \$106,800.00. However, this amount shall annually be increased by the lesser of; (i) 3% of the that amount, including all previous adjustment, or (ii) one-half of the annual unadjusted percentage increase in the consumer price index for the 12 months ending with the September proceeding each November 1, including all previous adjustments.<sup>109</sup> Obviously, by the time any police

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<sup>106</sup> 40 ILCS 5/3-110(c).

<sup>107</sup> 40 ILCS 5/3-110(d).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

officer is eligible to receive a Tier Two retirement pension, the maximum pension amount will be increased.

### **1.     §3.7    REDUCED PENSION BENEFITS**

A Tier Two pension beneficiary with at least ten or more years creditable service can receive a reduced pension after attaining age 50.<sup>110</sup> The retirement pension is reduced by one-half of 1% for each month that the police officer's age is under 55.

### **F.     §3.8       RETIREMENT PENSION INCREASES**

The Code also provides that the retirement pension of a police officer shall be increased in certain instances.<sup>111</sup> These increases were no doubt implemented to allow retirees to keep pace with the inflation rate. The entitlement to such increases depends upon a number of factors, including retirement date, years of service and age.

The monthly pension of a Tier One pension beneficiary who retires from service with 20 or more years of creditable service shall be increased in January of the year of attaining age 60, by 3% of the original grant of pension for each year he or she received pension payments.<sup>112</sup> In each January thereafter, the Tier One beneficiary shall receive an additional 3% increase of the original pension.<sup>113</sup>

The increases for Tier Two pension beneficiaries are slightly different. The monthly pension is increased on January 1, occurring either on or after the attainment of age 60 or the first anniversary of the pension start date, whichever is later.<sup>114</sup> Each annual increase shall be calculated at 3% of one-half

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<sup>110</sup> *Id.*

<sup>111</sup> 40 ILCS 5/3-111.1.

<sup>112</sup> 40 ILCS 5/3-111.1(c).

<sup>113</sup> *Id.*

<sup>114</sup> 40 ILCS 5/3-111.1(g).

the annual unadjusted percentage increase in the consumer price index for the 12 months ending with September preceding each November, whichever is less.

**G. §3.9        DISABILITY PENSION BENEFITS**

Article 3 of the Illinois Pension Code provides for two types of disability pension benefits to police officers who sustain injury or illness. These are:

- (a) Line of Duty Disability Pension;<sup>115</sup>
- (b) Not on Duty Disability Pension.<sup>116</sup>

There is no distinction in the entitlement to disability pension benefits between Tier One and Tier Two pension participants.

There are a number of important differences and distinctions between these benefits. These distinctions impact upon both the police officer and the pension fund. The following sections discuss these two types of benefits. The procedural and legal problems concerning the granting or the denial of these disability benefits are discussed in greater detail in Chapter 9.

**1. §3.10        LINE OF DUTY DISABILITY BENEFITS**

The statutory provision establishing line-of-duty disability pension benefits provides in pertinent part as follows:

§ 3-114.1. Disability pension--Line of duty.

- (a) If a police officer as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty, is found to be physically or mentally disabled for service in the police department, so as to render necessary his or her suspension or retirement from the police service, the police officer shall be entitled to a disability retirement pension equal to the greatest of (1) 65% of the salary attached to the rank on the police force held by the officer at the date of suspension of duty or retirement, (2) the retirement pension that the police officer would be

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<sup>115</sup> 40 ILCS 5/3-114.1.

<sup>116</sup> 40 ILCS 5/3-114.2

eligible to receive if he or she retired (but not including any automatic annual increase in that retirement pension), or (3) the pension provided under subsection (d), if applicable.

A police officer shall be considered “on duty” while on any assignment approved by the chief of the police department of the municipality he or she serves, whether the assignment is within or outside the municipality.<sup>117</sup>

The elements a police officer must prove in order to obtain a duty related disability under the above law are as follows:

- (1) he or she is a police officer;
- (2) an accident, injury or sickness was incurred in the performance of an act of duty;
- (3) the officer is found to be physically or mentally disabled so as to render necessary his or her suspension from service.

Under this Section, a police officer is considered “on duty” while on any assignment approved by the chief of police whether the assignment is within or outside the municipality.

The provisions in the Illinois Pension Code governing disability pension benefits are analogous to the Illinois Workers Compensation Act.<sup>118</sup> Because of this similarity, and the fact that the Pension Code was enacted to provide police officers with benefits similar to those provided under the Worker’s Compensation Act, the standards developed under that Act are applicable to disability cases under Article 3 of the Illinois Pension Code.<sup>119</sup>

If a line of duty disability pension is granted, the police officer is entitled to a pension of 65% of his monthly salary at the time of his suspension of duty or

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<sup>117</sup> 40 ILCS 5/3-114.1

<sup>118</sup> Mitsuuchi vs. City of Chicago, 125 Ill.2d 489, 532 N.E.2d 830, 127 Ill.Dec. 1 (188). The Workers Compensation Act is found in the Illinois Compiled Statutes, 820 ILCS 305 et seq.

<sup>119</sup> Mabie vs. Village of Schaumburg, 364 Ill.App.3d 756, 847 N.E.2d 796, 301 Ill.Dec. 786 (2006); Kellan vs. Park Ridge Firemen’s Pension Fund, 194 Ill.App.3d 573, 551 N.E.2d 264, 141 Ill.Dec. 271 (1990); O’Donnell vs. City of Chicago, 126 Ill.App.3d 548, 467 N.E.2d 971, 81 Ill.Dec. 849 (1984).

retirement, or the retirement pension that the police officer would be eligible to receive if he or she retired whichever is greater.<sup>120</sup> This pension benefit is not subject to taxation.

## 2. §3.11                    NOT-IN-DUTY DISABILITY BENEFITS

The statutory provision in the code dealing with a disability incurred while not on duty is as follows:

§3/114.2.                 Disability pension not on duty.

A police officer who becomes disabled as a result of any cause other than the performance of an act of duty, and who is found to be physically or mentally disabled so as to render necessary his or her suspension or retirement from police service in the police department, shall be entitled to a disability pension of 50% of the salary attached to the officer's rank on the police force at the date of suspension of duty or retirement.<sup>121</sup>

The elements a police officer must prove in order to obtain a not on duty related disability under the above law are:

- (1) he or she is a police officer;
- (2) an accident or injury occurred as a result of any cause other than the performance of an act of duty;
- (3) the officer is found to be physically or mentally disabled so as to render necessary his or her suspension from police service.

A non-duty related disability benefit entitles the officer to receive a disability pension of 50% of the officer's salary at the time of suspension of duty. This pension is taxable.

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<sup>120</sup> 40 ILCS 5/3-114.1.

<sup>121</sup> 40 ILCS 5/3-114.2.

H.

**§3.12**

**SURVIVORS' PENSION BENEFITS**

If a police officer entitled to a retirement or a disability benefit dies, certain of his relatives as survivors are then entitled to receive benefits. Upon the death of the police officer, only certain close family relatives are entitled to a police officer's pension as survivors. Survivorship pension benefits are paid to the individuals set forth in the sections that follow.

**1. §3.13**

**BENEFITS TO THE SURVIVING SPOUSE**

If a police officer is receiving a pension, upon his death, the surviving spouse shall be entitled to that pension.<sup>122</sup> If a police officer dies, either in or out of service, with at least 20 years creditable service, the pension earned by the police officer shall be paid to the spouse.<sup>123</sup> If the police officer dies with at least 10 years creditable service, but less than 20, the surviving spouse is entitled to a pension of  $\frac{1}{2}$  of the salary attached to the officer's rank.<sup>124</sup> If the police officer's death occurs as a result of an act of duty, the 10 year creditable service period does not apply.<sup>125</sup>

If a police officer dies on or after January 1, 2001 without having begun to receive either a retirement pension or a disability pension and the death was caused by sickness, accident or injury while on duty, the Tier One surviving spouse shall receive a pension of 100% of the salary attached to the rank held by the deceased police officer on the last day of service.<sup>126</sup>

A reoccurring issue concerning survivors' pension benefits was whether police widows were entitled to an annual 3% increase in such benefits. The Illinois Supreme Court has answered this question in the negative, holding that under

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<sup>122</sup> 40 ILCS 5/3-112(a).

<sup>123</sup> 40 ILCS 5/3-112(b).

<sup>124</sup> 40 ILCS 5/3-112(c).

<sup>125</sup> 40 ILCS 5/3-112(d).

<sup>126</sup> 40 ILCS 5/3-112(e).

the provisions of Article 3, widows are not entitled to such annual increases.<sup>127</sup>

Survivors' benefits are different for Tier Two beneficiaries. The benefits which a surviving spouse, children or dependent parents are entitled to receive is capped at 66  $\frac{2}{3}\%$  of the police officer's earned pension at the date of death.<sup>128</sup> However, a Tier Two surviving spouse is entitled to an annual increase on the January 1st after attainment of age 60 of 3% or one-half the annual unadjusted percentage increase in the consumer price index-u for the 12 months ending with September preceding each November 1, whichever is less.<sup>129</sup>

## **2. §3.14 BENEFITS TO DEPENDENT CHILDREN**

In the event that there is no surviving spouse, or upon the death or remarriage of the surviving spouse, the police officer's unmarried children under eighteen are entitled to equal shares of the pension benefits described in the section above.<sup>130</sup> The age eighteen limitation does not apply to any child who is considered dependent because of physical or mental disability.

## **3. §3.15 BENEFITS TO DEPENDENT PARENTS**

If a police officer dies leaving no eligible surviving spouse or dependent children, any dependent parent is eligible for survivorship benefits during the term of such dependency.<sup>131</sup>

## **I. §3.16 MINIMUM PENSION BENEFITS**

Effective January 1, 2001, the minimum retirement pension payable to a police officer with 20 or more years of creditable service, the minimum disability

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<sup>127</sup> Village of Roselle vs. Roselle Police Pension Board, 232 Ill.2d 546, 905 N.E.2d 831, 328 Ill.Dec. 942 (2009).

<sup>128</sup> 40 ILCS 5/3-112(a).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

pension and the minimum surviving spouse's pension shall be \$1000.00 per month.<sup>132</sup>

**J.                  §3.17                  ELIGIBILITY FOR PENSION BENEFITS**

In order to receive any form of pension benefits under Article 3, the individual must first be eligible for such benefits by being admitted as a member in the pension fund. Police officers do not automatically become members and participants in a police pension fund. Under the statute and case law, a participant must first make application into the fund.<sup>133</sup> A person failing to apply for fund membership is ineligible to receive benefits.<sup>134</sup>

What happens to a police officer who is denied admission into a pension fund? The Department of Insurance contends that he would be entitled to admission in to the Illinois Municipal Retirement Fund, (IMRF). However, at least one court has ruled that a police officer who was denied access to a police pension fund was properly excluded from the IMRF because under IMRF provisions, persons who perform police service are excluded from participation.<sup>135</sup>

**K.                  §3.18                  REFUND OF CONTRIBUTIONS**

A police officer who leaves or is discharged from the police department with less than 20 years of creditable service is entitled to a refund of his contributions paid into the pension fund.<sup>136</sup> The police officer must make a written request to the pension board for this refund. The officer is not entitled to any interest on the refund amount. Acceptance of the refund bars the police officer from future participation in the pension fund unless the individual re-enters active police service and re-joins the pension fund.<sup>137</sup> However, the police officer may be able to repay the

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<sup>132</sup> 40 ILCS 5/3-113.1(c).

<sup>133</sup> 40 ILCS 5/3-106.

<sup>134</sup> Young vs. Worth Police Pension Board, 57 Ill.App.3d 689, 373 N.E.2d 708, 15 Ill.Dec. 362 (1978); Donnels vs. Woodridge Police Pension Board, 159 Ill.App.3d 735, 512 N.E.2d 1082, 111 Ill.Dec. 541 (1987).

<sup>135</sup> Holmes vs. Illinois Municipal Retirement Fund, (Holmes I), 185 Ill.App.3d 282, 540 N.E.2d 1122, 133 Ill.Dec. 256 (1989).

<sup>136</sup> 40 ILCS 5/3-124.

<sup>137</sup> 40 ILCS 5/3-124.

amount refunded in order to transfer creditable service to another police pension fund.<sup>138</sup>

Can an officer with over twenty years of creditable service obtain a refund of his or her pension contributions? The Pension Code is silent as to this issue. However, the Department of Insurance takes the position that a police officer with twenty or more years of creditable service is not entitled to a refund. The officer is only entitled to a retirement pension.<sup>139</sup>

It has been held that a police officer convicted of a felony relating to his service as a police officer is still eligible to receive a refund of his pension contributions.<sup>140</sup> However, in that case the court also held that the officer was not entitled to a refund of his pension contributions because the amount of pension benefits he previously received exceed the amount of his contributions.

If an officer dies with less than ten years creditable service, the contributions are to be paid to the surviving spouse upon the written request.<sup>141</sup> If there is no surviving spouse, the contributions are paid to the officer's heirs or estate.

#### L. §3.19 RE-ENTRY INTO ACTIVE SERVICE

If a police officer receiving any type of pension re-enters active service, his or her pension benefits are terminated.<sup>142</sup> If the officer remains in service for less than five years before retiring again, the pension amount remains the same as upon the first retirement.

Recently, there have been several cases where police officers have retired and are granted a retirement pension and then are rehired in another job title by

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<sup>138</sup> Id.

<sup>139</sup> Department of Insurance, Handbook for Police Pension Trustees §960 B. (1995).

<sup>140</sup> Phelan vs. LaGrange Park Police Pension Fund, 327 Ill.App.3d 527, 763 N.E.2d 343 261 Ill.Dec.373 (2001).

<sup>141</sup> 40 ILCS 5/3-124.

<sup>142</sup> 40 ILCS 5/3-124.1.

the same municipality. If the position the retired police officer is re-hired in involves police duties and responsibilities, the individual may be considered to have re-entered active service and will not be eligible to continue to receive a retirement pension.

A police officer who returns from active service and seeks to rejoin the pension fund has two options. The officer can again become a new participant in the pension fund without repaying the refunded contribution amount.<sup>143</sup> In this instance the officer cannot reinstate the creditable service lost by virtue of the previous refund of contributions. Second, the officer can reinstate his creditable service by repaying the refunded contribution amount back to the pension board together with interest at 2% per annum from the date of the refund.<sup>144</sup> The Department of Insurance takes the position that the repayment of the refund and the reinstatement of creditable service can be made at any time prior to retirement on any type of pension.

**M.            §3.20            SELF-MANAGED PLAN PROVISIONS**

The Pension Code also contains a type of Article 3 pension plan referred to as the Self-Managed Plan.<sup>145</sup> The current Article 3 pension system is defined benefit plan under which the pension benefit that a police officer is to receive is guaranteed by the pension fund and ultimately, the municipality. The Self-Managed Plan legislation establishes a defined contribution plan.

Under a defined benefit plan, there is a definite formula by which the plan participants' benefits will be measured. This formula may provide that the pension benefits will be a particular percentage of the participant's average compensation over his or her entire service or over a particular number of years of service, or it may provide a definite dollar amount for each year of service. In plans of this type, the employer's contributions are determined actuarially. No individual accounts are maintained as is done in the defined contribution plans.

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<sup>143</sup> Fairview Heights Police Pension Board vs. Mathias, 92 Ill.App.3d 559, 416 N.E.2d 52, 48 Ill.Dec. 157 (1981).

<sup>144</sup> 40 ILCS 5/3-124.

<sup>145</sup> 40 ILCS 5/3-109.3.

A defined contribution or individual account plan is defined as a plan that provides for an individual account of each participant and for benefits based solely on: (1) the amount contributed to the participant's account plus (2) any income, expenses, gains and losses. Under the defined contribution plan there is no guarantee as to any fixed retirement benefit amount.

Although still a part of the Pension Code, the Self-Managed Plan legislation has never been put into effect. At this point in time these provisions are dormant.

**CHAPTER 4**  
**CREDITABLE SERVICE**

- A. §4.1 INTRODUCTION
- B. §4.2 DETERMINING CREDITABLE SERVICE
- C. §4.3 INCREASING CREDITABLE SERVICE
- 1. §4.4 EXECUTIVE POSITION IN A POLICE  
ORGANIZATION
- 2. §4.5 DISABILITY PENSION BENEFITS
- 3. §4.6 MILITARY SERVICE
- D. §4.7 TRANSFERRING CREDITABLE SERVICE
  - 1. §4.8 TRANSFER TO OTHER ARTICLE 3 FUNDS
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RETIREMENT SYSTEM
  - 3. §4.10 TRANSFER TO ARTICLE 8, 9, or 13 PENSION  
FUNDS
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RETIREMENT SYSTEM

**CHAPTER 4**  
**CREDITABLE SERVICE**

- A. §4.1 **INTRODUCTION**

Along with a police officer's age, creditable service determines the amount of the retirement pension to be received. This Chapter discusses what constitutes creditable service and under what circumstances creditable service can be increased and transferred to and from other Illinois public pension systems.

**B. §4.2        DETERMINING CREDITABLE SERVICE**

The term "creditable service" means the time employed as a member of the regular police force in the municipality.<sup>146</sup> Furloughs and leaves of absences without pay exceeding thirty (30) days in any one year do not count as creditable service. However, leaves of absences for illness or injury and periods of disability for which a police officer receives no disability pension benefits shall be counted as creditable service. The burden is on the person seeking the retirement pension benefit to prove creditable service.<sup>147</sup> The failure to prove the appropriate creditable service will result in the diminishment or the denial of the retirement pension.

**C. §4.3        INCREASING CREDITABLE SERVICE**

There are a number of ways that a police officer can add to and increase his or her creditable service when not actively employed in the regular police force in the municipality. These creditable service additions are discussed in the sections that follow.

**1. §4.4        EXECUTIVE POSITION IN A POLICE ORGANIZATION**

An exception to the creditable service requirement has been created for active police officers who are on a leave of absence who are employed in an executive capacity of any organization whose

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<sup>146</sup> 40 ILCS 5/3-110(a)

<sup>147</sup> Saipe vs. Teacher's Pension and Retirement Fund, 144 Ill.App.3d 735, 494 N.E.2d 664, 98 Ill.Dec. 542 (1986).

members consist of police officers.<sup>148</sup> There are no further definitions as to what constitutes a qualifying police organization or what is considered as employment in an executive capacity.

There are four pre-requisites that must be established before creditable service can be added under this exception.

- (1) The police officer must be a participant in an Article 3 pension fund with at least 10 years of service;
- (2) The police officer has received no creditable service for such employment under any other Illinois public pension fund;
- (3) The police officer must pay to the police pension fund the amount of contributions that he or she would have contributed had the officer been an active member of the police department; and
- (4) The police organization pays a contribution equal to the municipality's normal cost for that period of service.<sup>149</sup>

The Code does not explain how the municipality's normal cost is to be calculated.

## **2. §4.5 DISABILITY PENSION BENEFITS**

A police officer who is awarded either a line-of-duty or not-on-duty disability pension may add up to three years of time while receiving pension benefits as creditable service.<sup>150</sup> To receive this additional creditable service, the police officer must meet the following requirements;

- (1) The police officer must return to active duty after the disability for a period of time equal to the period of the additional creditable service;

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<sup>148</sup> 40 ILCS 5/3-110(c).

<sup>149</sup> *Id.*

<sup>150</sup> 40 ILCS 5/3-110(a-5).

- (2) The police officer pays contributions to the pension fund for the period of time had he or she been an active police officer.<sup>151</sup>

The repaid contributions can be made at any time prior to the commencement of a retirement pension and must include interest at 6% a year compounded annually from the date for which the additional creditable service is being established to the date of payment.

There is no provisions under this section for payment of the municipality's portion of the contributions.

### **3. §4.6 MILITARY SERVICE**

Creditable service can be increased by periods of service in the military two ways. First, if an active police officer serves in the military, air force, or navy, he or she can add up to five years of creditable service for time spent in the military.<sup>152</sup> Prior to applying for a retirement pension, the police officer must pay to the pension board the amount the officer would have contributed if he or she had been a regular contributor during that period, if the municipality has not made such contributions on the officer's behalf.

Second, a police officer can add up to two years of creditable service for time spent in the military, naval or air forces prior to becoming a police officer.<sup>153</sup> In order to obtain this creditable service increase, the officer must pay the pension fund the amount he or she would have contributed had the individual been a regular contributor to the pension fund during that period of time. In addition, the officer must also pay an amount determined by the pension board to be equal to the

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<sup>151</sup> *Id.*

<sup>152</sup> 40 ILCS 5/3-110(b).

<sup>153</sup> 40 ILCS 5/3-110(b-5).

municipality's normal cost of the pension benefit, plus interest at the actuarially assumed rate calculated from the date the individual became a police officer.<sup>154</sup>

#### D. §4.7 **TRANSFER OF CREDITABLE SERVICE**

Creditable service earned as a police officer under Article 3 of the Pension Code may be transferred to other Article 3 police pension funds<sup>155</sup> as well as to any of the following Illinois public employee pension systems:

- (a) General Assembly Retirement System;<sup>156</sup>
- (b) State Employees' Retirement System;<sup>157</sup>
- (c) County Employees' Benefit Fund;<sup>158</sup>
- (d) Sanitary District Employees' Benefit Fund.<sup>159</sup>

The rules for transferring creditable service differ depending on what pension system creditable service is transferred to or from.

##### 1. §4.8 **TRANSFER TO OTHER ARTICLE 3 PENSION FUNDS**

The most common creditable service transfer occurs when a police officer seeks to transfer creditable service from another Article 3 pension fund in which he or she had previously been a participant. Allowing such pension portability or creditable service transfers is laudable for a number of reasons, which are:

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<sup>154</sup> *Id.*

<sup>155</sup> 40 ILCS 5/3-110(d)(1); 40 ILCS 5/3-107.

<sup>156</sup> 40 ILCS 5/3-110.2.

<sup>157</sup> 40 ILCS 5/3-110.6.

<sup>158</sup> 40 ILCS 5/3-110.4.

<sup>159</sup> *Id.*

- (1) Allowing police officers to take vested pension benefits with them when they change police departments;
- (2) Ensuring that police officers have a retirement pension to take with them when they change jobs;
- (3) Ensuring that the value of a police officer's projected retirement benefit does not erode solely because he or she has transferred to another police department.<sup>160</sup>

The creditable service transfer provisions between Article 3 police pension funds allow active police pension fund members to transfer accrued creditable service between Article 3 pension funds conditioned upon a payment of any resulting additional cost to the transferee fund. The law also allows an individual with less than 8 years of creditable service to receive a retirement pension from a police pension fund if that individual has at least 8 years of creditable service in another police pension fund and is receiving a retirement pension. The amendments further provide that creditable service may be "brought back" by repaying any refunded contributions, plus interest.

The Pension Code<sup>161</sup> provides for the transfer of creditable service between Article 3 police pension funds if the following conditions are met:

- (1) the police officer is an active member of an Article 3 pension fund; and,
- (2) the police officer actively served in the police department under that fund for at least two years;  
or,

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<sup>160</sup> See, Gates, Pension Portability for State & Local Government, Milibark Memorial Fund (1966).

<sup>161</sup> 40 ILCS 5/3-110.7(a).

(3) the police officer served less than two years, but was involuntarily separated from the police department for reasons other than the fault of the officer; or,

(4) the police officer was not in service in the police department under that fund on or after the effective date of the law.

From the above it would seem that any police pension fund participant who is in service at the time of this amendment who has prior creditable service in another pension fund can transfer that creditable service to the officer's present police pension fund. After the effective date of the amendment the police pension participant must have at least two years of creditable service before a transfer can be made unless the officer was laid off or involuntarily separated through no fault of the officer prior to this two year period.<sup>162</sup>

A police pension fund participant who has accepted a refund of his or her contributions from a previous pension fund can also buy back the past creditable service for purposes of transferring.<sup>163</sup> The mechanics of buying back and transferring creditable service are discussed in the section that follows.

There are a number of steps to the process of transferring creditable service under this new Pension Code provision. The officer must first make an application to his current pension fund of his or her intention to transfer creditable service and related contributions accumulated in another Article 3 pension fund or qualifying creditable service in the IMRF.<sup>164</sup> If the prior creditable service requires reinstatement and repayment of previously refunded contributions, the police officer must take steps to reinstate creditable service by repaying the refunded amount plus

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<sup>162</sup> *Id.*

<sup>163</sup> 40 ILCS 5/3-110.7(b).

<sup>164</sup> 40 ILCS 5/3-110.7(a).

interest at a rate of 6% per year compounded annually, from the date of the refund to the date of repayment.<sup>165</sup>

After receiving the police officer's transfer request, the officer's current fund notifies the previous fund or funds of the intention to transfer creditable service. Upon being notified of the transfer, the previous fund notifies the current pension fund of the total creditable service existing and the amount of monies that are subject to transfer. The monies subject to transfer are enumerated as follows:

- (a) the police officer's contributions;
- (b) the municipality's contributions;
- (c) interest on the above; and;
- (d) any contribution repayments.

Once the transferee pension fund receives the above information from the previous police pension fund, it must then determine the "true cost" to the pension fund of allowing the transfer. If the pension fund receiving the transferred creditable service and related contributions determines that the transferred amount is inadequate and is less than the "true cost" to the transferee fund, the police officer must make up any difference.<sup>166</sup> Since the Article 3 portability provisions have been enacted, most police officers seeking to transfer creditable service between police pension funds have had to pay large sums of money as and for the "true cost" component.

The Pension Code provides that the Department of Insurance, will promulgate rules for making this "true cost" calculation.<sup>167</sup> These rules take into account appropriate actuarial assumptions, the police officer's service, age and salary history and the funding level of the transferee pension fund, as well as other factors

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<sup>165</sup> 40 ILCS 5/3-110(b).

<sup>166</sup> 40 ILCS 5/3-110(d)(2).

<sup>167</sup> 40 ILCS 5/3-110(d)(6).

determined to be relevant by the Department. The determination of the “true cost” component that the transferee police pension fund must make can be done by either the Illinois Department of Insurance or an actuary selected by the pension board. As indicated above, once the “true cost” component is ascertained, the police officer seeking to transfer creditable service must pay this additional amount in order for the transfer to take effect.

The Pension Code allows the police officer to pay this additional contribution in one lump sum or by installment payments that the transferee pension board has approved. If the police officer dies in service before the payment of the additional contributions have been made or before the expiration of the five year payment period, the surviving spouse may elect to pay the remaining amount of the unpaid contributions within six months of the date of death.<sup>168</sup> In such case, the surviving spouse will receive the benefits of the additional creditable service.

If this additional “true cost” amount is not paid in full by the police officer or his surviving spouse within the required time, the creditable service will not be transferred.<sup>169</sup> The police officer is then entitled to a refund of the following amounts:

- (1) any partial payments of the “true cost” amounts paid by the officer;
- (2) the transferred amount that represents the officer’s contributions paid by the transferor pension paid;
- (3) any interest paid by the officer to the transferor pension fund to reinstate creditable service.

The officer does not receive any interest accumulated from his contributions. The Pension Code is silent as to what happens to this interest and the employers’ portion of the contributions including interest. We would assume that this

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<sup>168</sup> 40 ILCS 5/3-110(d)(4).

<sup>169</sup> 40 ILCS 5/3-110(d)(5).

amount would revert back to the transferor pension fund.

One thing is clear under the law. If the police officer fails to pay the additional contributions within the required time, then the transferred creditable service is lost. This creditable service cannot be reinstated back to the transferor fund and it cannot be transferred to another Article 3 pension fund.

Under the statutory formula for the transferring of creditable service, less senior police officers will have a lower cost to transfer creditable service, approximately \$3,000.00 per year of service. It must be remembered that this amount is in addition to any amounts that must be paid for previously refunded contributions. For more senior officers though, the cost may be as high as \$10,000 per year of service to be transferred! Why is the cost so high? Because the officer's contributions cover only about  $\frac{1}{3}$  of the cost of their pensions, and when their prior fund "matches" their contributions, only about  $\frac{2}{3}$  of the "true cost" is being transferred.

As can be seen from the above, pension portability between Article 3 police pension funds is a good idea. However, in many cases, the requirement on the officer's part of paying the "true cost" makes the transfer of creditable service financially impossible.

## 2. **§4.9 TRANSFER TO THE GENERAL ASSEMBLY RETIREMENT SYSTEM**

An active member of the Illinois General Assembly Retirement System may transfer any creditable service accumulated in an Article 3 police pension fund to the General Assembly Retirement System.<sup>170</sup> In the event of such a transfer request, the Article 3 pension fund must pay:

- (1) The applicant's contributions to date; and
- (2) The municipal contributions in an amount equal to the applicant's contributions.

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<sup>170</sup> 40 ILCS 5/3-110.2(a).

An active member of the Illinois General Assembly may reinstate service in a police pension fund by repaying the refunded amount plus interest at 6%.<sup>171</sup>

### **3.     §4.10   TRANSFER TO ARTICLE 8, 9 or 13 PENSION FUNDS**

Certain county officers, municipal officers, sanitary district commissioners, county sheriffs, and under sheriffs may transfer creditable service to Article 8, 9, or 13 pension funds.<sup>172</sup> Such individuals may also reinstate creditable service in a police pension fund by repaying the refunded amount plus interest at 6%.<sup>173</sup>

### **4.     §4.11   TRANSFER TO THE STATE EMPLOYMENT RETIREMENT SYSTEM**

Any investigator for the state's attorneys, appellate prosecutor or a controlled substance investigator may transfer creditable service from an Article 3 police pension fund into a State Employee's Retirement System (Article 14), provided the individual is an active participant in the Article 14 system.<sup>174</sup> The same individuals may also reinstate creditable service back into an Article 3 police pension fund by repaying any refunded contributions plus interest at 6%.<sup>175</sup>

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<sup>171</sup> 40 ILCS 5/3-110.2(b).

<sup>172</sup> 40 ILCS 5/3-110.4(a).

<sup>173</sup> 40 ILCS 5/3-110.4(b).

<sup>174</sup> 40 ILCS 5/3-110.6(a).

<sup>175</sup> *Id.*

## **CHAPTER 5**

### **POWERS OF PENSION BOARD TRUSTEES UNDER ARTICLE 3**

- A. §5.1 INTRODUCTION
- B. §5.2 STATUTORY POWERS
- C. §5.3 COMPOSITION OF PENSION BOARD
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## **CHAPTER 5**

### **POWERS OF PENSION BOARD TRUSTEES UNDER ARTICLE 3**

- A. **§5.1 INTRODUCTION**

A review of the various chapters of the Illinois Pension Code, including Article 3 dealing with police pension funds in municipalities having less than 500,000 people, would indicate that pension trustees have both difficult and far-reaching powers. Trustees also have difficult responsibilities and liabilities. Trustees of pension funds can sue or be sued in either an official or individual capacity for decisions made or not made under the Code. The powers and responsibilities of pension board trustees are contained in numerous provisions of the Pension Code.<sup>176</sup> The powers and duties of pension board trustees are also established under the Illinois common law dealing with trusts.

#### **B. §5.2            STATUTORY POWERS**

The control and management of a police pension fund under Article 3 is vested solely in the board of trustees of that fund. The police pension fund is not run by the mayor, police chief or any other governmental official. The pension trustees act collectively, and solely in the interests of the pension fund's participants and beneficiaries.<sup>177</sup> A police pension board under Article 3 has only those functions and powers that are set out or implied in the statute.<sup>178</sup> The statutory powers of a police pension board under Article 3 of the Illinois Pension Code include management of the pension fund as well as the following:

- (a) holding of elections;
- (b) determining who can be admitted into the fund;
- (c) investment of pension fund assets;
- (d) holding meetings;
- (e) adjudicating claims for retirement and disability pensions;

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<sup>176</sup> See e.g., 40 ILCS 5/3-128-5/3-143.

<sup>177</sup> 40 ILCS 5/1-109(a); Barrington Police Pension Fund vs. Department of Insurance, 211 Ill.App.3d 698, 570 N.E.2d 622, 156 Ill.Dec. 146 (1991).

<sup>178</sup> Pickering vs. Illinois Human Rights Commission, 146 Ill.App.3d 340, 496 N.E.2d 746, 99 Ill.Dec. 885 (1986); Rossler vs. Morton Grove Police Pension Board, 178 Ill.App.3d 769, 533 N.E.2d 927, 127 Ill. Dec. 845 (1989).

- (f) enforcing payment of contributions;
- (g) adopting rules; and,
- (h) making disbursements.

These powers cannot be altered by the municipality.<sup>179</sup>

#### **C. §5.3        COMPOSITION OF THE PENSION BOARD**

The composition of a police pension board is established by the express terms of the Pension Code.<sup>180</sup> A police pension board under Article 3 consists of the following members:

- (a) Two members appointed by the mayor or president of the municipality;
- (b) Two members elected by the active participants (police officers) of the pension fund;
- (c) One member elected by and from the beneficiaries of the pension fund.<sup>181</sup>

The appointed trustees serve two year staggered terms of office or until successors are appointed and qualified.<sup>182</sup> The elected trustees also serve two year terms. The procedures dealing with the election of pension trustees are explained in the next section.

#### **D. §5.4        ELECTION OF TRUSTEES**

The pension board members chosen from the active and retired police officers are elected by ballot in elections that are to be held on the third Monday in April of the applicable year in a place or places within the municipality as determined by the pension board.<sup>183</sup> Each elected member of the board serves for two years and until his or her successor has been duly elected and qualified. In the event of the failure, resignation or inability to act of any elected member, a successor is to be elected

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<sup>179</sup> 40 ILCS 5/3-150.

<sup>180</sup> 40 ILCS 5/3-128.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

for the unexpired term at a special election, conducted in the same manner as the regular election. Article 3 does not specify what election procedures should be followed other than indicating who can vote and requiring voting by secret ballot. (the Australian ballot system). The following procedures for the election of trustees are suggested.

It is advisable that pension boards establish written election procedures by rules and regulations. Written rules will ensure that the same procedures are followed each election year. All elections should be supervised by the trustees who are appointed. Elections can be conducted by mail. However, the pension board, by a majority vote of the trustees, may hold elections in any other manner that is consistent with the Pension Code. Elections that are not conducted by mail can be held at a convenient place within the municipality as determined by a majority vote of the trustees.

All active police officers who are members and participants of the pension fund are eligible to run for the office of pension board trustee representing the active pension fund participants. All retired police officers and beneficiaries are eligible to run for the office of pension board trustee representing the retired members and beneficiaries. At any election, each active participant shall be entitled to nominate two persons for the office of pension board trustee representing the active members. At any election, any beneficiary shall be entitled to nominate one person for the office of pension board trustee on behalf of the beneficiaries. A pension board participant or retiree may nominate himself or herself for the office of the pension board trustee.

In the event that only two active participants are nominated for pension board trustee in any given election year, or only one beneficiary is nominated in any given election year, the persons so nominated may be elected by acclamation.

If an elected trustee dies, resigns or is unable to serve, a special election is to be held to elect a successor to the unexpired term.<sup>184</sup>

### **1.     §5.5 ELECTION TIMETABLE AND PROCEDURES**

The following timetable is suggested when holding an election for police pension trustees:

- (1) Select or appoint a supervising trustee.
- (2) March 1, mail Notice of Election and Request for Nominations form to each participant and beneficiary eligible to vote, with a deadline date;
- (3) March 21<sup>st</sup> is the suggested deadline for return of nomination petitions. Nominations either received or postmarked after March 21<sup>st</sup> will be invalid. All nominations will be initialed by a supervising trustee, with the date and time of receipt noted on the nomination ballot.
- (4) On April 1, mail the ballots and election material to eligible participants and beneficiaries. Each ballot packet shall contain a voting instruction sheet, a signature card identifying the voter, a self-addressed return envelope and the ballot itself.

The instruction sheet shall advise the voter of the appropriate method to mark the ballot and to return the ballot in the self-addressed envelope along with the signed signature card. The instruction sheet shall also specify that all ballots must be post-marked or received by the Pension Board no later than the 3<sup>rd</sup> Monday in April. All ballots postmarked or received after the 3<sup>rd</sup> Monday in April shall be invalid and will not be counted in any election.

- (5) Third Monday in April, convene a meeting and count ballots.
- (6) After the ballots are counted, post the election results.

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<sup>184</sup> *Id.*

- (7) In cases of ties, a runoff election would be held the Third Monday in May.

The following materials are needed under the above election procedures;

- (1) Mailing list of eligible participants and beneficiaries.
- (2) Notice of Election and Nomination Forms.
- (3) Ballots.
- (4) Election Instructions.
- (5) Ballot Envelopes.
- (6) Self-addressed stamped return envelopes.
- (7) Notice of Election Results.

**E. §5.6 CONTROL AND MANAGEMENT OF THE PENSION FUND**

The Pension Code accords a pension board the broad authority to control and manage the pension fund and its assets in order to provide pension and disability benefits to retired and disabled police officers, their surviving spouses, minor children and dependent parents. The control and management of the pension fund is solely and exclusively under the domain of the pension board trustees, including the investment of pension funds.<sup>185</sup> The board of trustees of a police pension fund in Illinois acts as an administrative agency vested with extensive authority and the board exercises quasi-judicial powers.<sup>186</sup> The term “quasi-judicial” means that such an agency, while not a part of the judiciary, exercises functions of a judicial nature.<sup>187</sup>

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<sup>185</sup> 40 ILCS 5/3-132.

<sup>186</sup> Bowden vs. Flannery, 18 Ill.App.2d 299, 152 N.E.2d 188 (1958).

<sup>187</sup> Parker vs. Kirkland, 298 Ill.App.3d 18 N.E.2d 709 (1940).

Since a pension board is an administrative agency created by statute, the board possesses only those powers that are authorized by the Pension Code.<sup>188</sup> However, it is a rule of administrative law that governmental agencies must be left free to devise their own procedures for the handling of their business.<sup>189</sup> As such, the courts allow pension boards a certain amount of leeway in the conduct of their affairs. On the other hand, the courts will not hesitate to overturn a pension board's decision if it feels that the trustees acted beyond the scope of their statutory powers. For example, in one case the appellate court ruled that a police pension board had no authority to conduct a re-hearing to determine if a mistake had been made in granting a pension.<sup>190</sup> Thus, it is important for pension board trustees to know the scope and extent of their powers and authority under the Illinois Pension Code, and to seek the advice of experienced legal counsel when there is a question concerning such statutory authority.

So long as the board exercises its fund management functions properly, it is in total control of pension fund affairs and assets. As such, a municipality has no power over the day-to-day management of the fund, other than the appointment of certain members to the board.<sup>191</sup> The pension board is however, regulated by the Illinois Department of Insurance.<sup>192</sup>

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<sup>188</sup> Rossler vs. Morton Grove Police Pension Board, 178 Ill.App.3d 769, 533 N.E.2d 927, 127 Ill. Dec. 845 (1989); City of Chicago vs. Illinois Fair Employment Practices Commission, 34 Ill.App.3d 114, 339 N.E.2d 260 (1975).

<sup>189</sup> Vermont Yankee Nuclear Power Corp. vs. National Resources Defense Counsel, 435 U.S. 519 (1978); Stofer vs. Motor Vehicle Casualty Co. 68 Ill.2d 361, 369 N.E.2d 875, 12 Ill. Dec. 168 (1977).

<sup>190</sup> Rossler vs. Morton Grove Police Pension Board, *supra*.

<sup>191</sup> Billik vs. Village of Brookfield, 80 Ill.App.3d 907, 400 N.E.2d 702, 36 Ill. Dec. 292, (1980). However, the municipality does have some discretion in determining the amount of taxes to be levied for the fund. See, Rockford Police Pension Fund vs. City of Rockford, 96 Ill.App.3d 102, 420 N.E.2d 1126, 51 Ill. Dec. 68 (1981).

<sup>192</sup> 40 ILCS 5/22-501, *et seq.*

If the Department of Insurance determines that a public pension fund is violating the Code, the Department is empowered to take certain legal action, which includes the power to subpoena records,<sup>193</sup> hold hearings,<sup>194</sup> assess penalties<sup>195</sup> and bring legal action.<sup>196</sup>

**F. §5.7        BOARD MEETINGS**

Article 3 requires a police pension board to hold meetings every quarter.<sup>197</sup> The statute specifies that meetings should be held during the months of January, April, July and October. There is nothing in the Code that prevents police pension boards from meeting more than four times a year. As a practical matter, many boards meet more than four times a year simply because it takes more than four meetings to complete the agenda, adjudicate disability and retirement claims and make investment decisions. The board's president can call special meetings if necessary.<sup>198</sup> Since what transpires at pension board meetings can come under public scrutiny and review, accurate notes and minutes must be kept of all proceedings.

A pension board is a "public body" as that term is defined under the Open Meetings Act.<sup>199</sup> As such, all pension board meetings are required to be public meetings.<sup>200</sup>

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<sup>193</sup> *Id.*, 5/22-506.

<sup>194</sup> *Id.*, 5/22-509.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*, 5/1-115.

<sup>197</sup> 40 ILCS 5/3-130.

<sup>198</sup> *Id.*

<sup>199</sup> 5 ILCS 120/1.02.

<sup>200</sup> 5 ILCS 120/2(a).

There are certain exceptions to the Open Meetings Act which allow “closed” or “executive” sessions. These exceptions are narrowly construed by the courts.<sup>201</sup> The following exceptions would apply to pension boards:

- (a) meetings of pension boards where the sale of securities is to be discussed;
- (b) meetings to consider the appointment, employment or dismissal of an employee;
- (c) deliberations as to administrative hearings, provided the board prepares and makes available for distribution a written decision;
- (d) meetings to discuss pending or probable litigation;
- (e) meetings to settle claims.<sup>202</sup>

However, no final action may be taken at a closed meeting.

Pension board deliberations concerning pension or disability claims are exceptions to the Open Meetings Act and such deliberations can and should be conducted in executive session.<sup>203</sup> Discussions by the board with its legal counsel to secure advice on matters in litigation or possible litigation can also be held in executive session.<sup>204</sup> Written minutes must be kept of all meetings, whether open or closed.<sup>205</sup>

## **1.     §5.8   ELECTION OF OFFICERS**

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<sup>201</sup> Illinois News Broadcasters Ass'n vs. City of Springfield, 22 Ill.App.3d 226, 317 N.E.2d 288 (1974).

<sup>202</sup> 5 ILCS 120/2(c).

<sup>203</sup> Calibrao vs. Board of Trustees of the Buffalo Grove Firefighters' Pension Fund, 367 Ill.App.3d 259, 854 N.E.2d 787, 305 Ill.Dec. 195 (2006).

<sup>204</sup> People ex rel Hopf vs. Barger, 30 Ill.App.3d 525, 332 N.E.2d 649 (1975).

<sup>205</sup> 5 ILCS 120/2.06.

At its regular July meeting, a pension board created under Article 3 is to select a president, vice-president, secretary and assistant secretary.<sup>206</sup> Such officer's serve for a period of one year or until successors are elected and qualified. A pension board would also be allowed to designate additional officers, if it desired to do so. In most cases, the election of officers is not contested. In such instances, the officers can be elected by acclamation.

#### **G. §5.9 EMPLOYMENT AND HIRING OF EXPERTS**

In connection with the power to manage and control the pension fund, police pension trustees have the express power to hire clerical staff.<sup>207</sup> However, no person receiving a pension can be employed by the pension board.

The board also has the implicit power to hire or retain qualified experts and professionals to assist the board in the administration of the pension fund. Such experts would include legal counsel, investment advisors, actuaries, accountants and examining physicians. The hiring of such experts should only be done at a pension board meeting with the approval of a majority vote of the trustees.

#### **H. §5.10 RULEMAKING**

The Code authorizes pension board trustees to promulgate rules and regulations as an aid in carrying out the duties and functions of the board.<sup>208</sup> The Department of Insurance has even encouraged police pension boards to adopt rules and regulations. However, any rules and regulations that are adopted must conform to the provisions of the Pension Code.

An administrative body, such as a pension board, is given wide discretion in adopting rules to carry out its statutory functions.<sup>209</sup> An administrative agency has the authority to construe statutory

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<sup>206</sup> 40 ILCS 5/3-130.

<sup>207</sup> 40 ILCS 5/3-137.

<sup>208</sup> 40 ILCS 5/3-140.

<sup>209</sup> Yu vs. Clayton, 147 Ill.App.3d 350, 497 N.E.2d 1278, 100 Ill.Dec. 916 (1986).

provisions and to develop guidelines as an aid to enforcing the statute. Such rules are entitled to deference by the courts unless clearly erroneous, arbitrary or unreasonable.<sup>210</sup> Thus, a good set of pension board rules can clarify many of the ambiguities contained in the Pension Code. Another important factor of administrative rules is their effect. Rules adopted by an administrative agency have the force and effect of law.<sup>211</sup>

Another advantage of rules or regulations for a pension board is that the cumbersome and lengthy rule-making procedures under the Illinois Administrative Procedure Act do not apply. This is because a police pension board is a unit of local as opposed to state government and is thus exempt from the provisions of the Administrative Procedure Act.<sup>212</sup>

The enactment of rules and regulations can help a pension board perform its functions in any or all of the following areas: (1) recordkeeping; (2) admission into and withdrawal from the pension fund; (3) the issuance of administrative subpoenas; (4) election of pension board trustees; (5) hearing procedures in disability and retirement pension claims; (6) investment policies; and (7) pension board forms.

Once adopted, such rules become pension board policy and must be followed.<sup>213</sup> When an administrative agency adopts rules and regulations, the rules cannot be disregarded or applied in an arbitrary fashion.<sup>214</sup> If a pension board desires to promulgate rules or regulations it is advisable to retain competent legal counsel in order to assist in the drafting of such regulations and to determine

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<sup>210</sup> Federation of Teachers' vs. Teachers Retirement System, 191 Ill.App.3d 769, 548 N.E.2d 64, 138 Ill.Dec. 834, (1990).

<sup>211</sup> Department of Corrections vs. Civil Service Commission, 187 Ill.App.3d 304, 543 N.E.2d 190, 134 Ill.Dec. 907 (1989). Rules adopted by an administrative agency are presumed to be valid by the courts. Eastman Kodak Co. vs. FEPC, 86 Ill.2d 60, 426 N.E.2d 877, 55 Ill.Dec. 552 (1981).

<sup>212</sup> Macon County vs. Board of Education, 165 Ill.App.3d 1, 581 N.E.2d 653, 116 Ill.Dec. 31 (1987).

<sup>213</sup> Chicago Transit Authority vs. Industrial Commission, 141 Ill.App.3d 930, 491 N.E.2d 58, 96 Ill.Dec. 244 (1986).

<sup>214</sup> Heavner vs Illinois Racing Board, 103 Ill.App.3d 1020, 432 N.E.2d 290, 59 Ill.Dec. 706 (1982).

whether any notice or hearing requirements should be established prior to implementation of such rules.

## I. **§5.11 HEARING POWERS**

One of the major duties of a pension board is to adjudicate and decide who is entitled to retirement or disability benefits.<sup>215</sup> Such adjudications include the granting or denial of pension disability benefits,<sup>216</sup> retirement pensions<sup>217</sup> and granting or denying of benefits to survivors.<sup>218</sup> These hearing powers also apply to the termination or reduction of pensions.<sup>219</sup>

The pension board must exercise a great deal of care when adjudicating claims. A pension board has neither the right nor the power to pay pension benefits to individuals who are not statutorily entitled to receive such benefits.<sup>220</sup> A careless or mistaken decision is very difficult to reverse<sup>221</sup> and could cost the pension board hundreds of thousands of dollars in benefits that should not have been paid.

The decisions made by pension boards with regard to retirement or disability claims are subject to review by the courts.<sup>222</sup> The provisions of the Administrative Review Act<sup>223</sup> apply in review of the board's adjudications and administrative decisions under the Code. The adjudication of pension claims is discussed in greater detail in Chapter 9.

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<sup>215</sup> 40 ILCS 5/3-133.

<sup>216</sup> See, Markham vs. Kankakee Firemen's Pension Fund, 198 Ill.App.3d 603, 555 N.E.2d 1270, 144 Ill.Dec. 751 (1990)

<sup>217</sup> See, Swibaker vs. Board of Trustees, Firemen's Pension Fund, 140 Ill.App.3d 550, 488 N.E.2d 1052, 94 Ill.Dec. 805 (1986).

<sup>218</sup> See, Siciliano vs. Westchester Firefighters' Pension Fund, 202 Ill.App.3d 964, 560 N.E.2d 885, 148 Ill.Dec. 288 (1990).

<sup>219</sup> Bassett vs. Pekin Police Pension Board, 362 Ill.App.3d 235, 839 N.E.2d 130, 298 Ill.Dec. 143 (2005).

<sup>220</sup> McCann vs. Retirement Board, 331 Ill.193, 162 N.E.859 (1928); Bowden vs. Flannery, 18 Ill.App.2d 299, 152 N.E.2d 188 (1958).

<sup>221</sup> See e.g., Rossler vs. Morton Grove Police Pension Board, 178 Ill.App.3d 769, 533 N.E.2d 927, 127 Ill.Dec. 845 (1989).

<sup>222</sup> 40 ILCS 5/3-148.

<sup>223</sup> 735 ILCS 5/3-101, et seq.

**J. §5.12 ENFORCEMENT OF MUNICIPAL CONTRIBUTIONS**

The police pension board also has the power and the duty to collect and enforce contributions to the pension fund.<sup>224</sup> The collection of delinquent pension contributions is discussed in greater detail in Chapter 7.

**K. §5.13 DISBURSEMENTS**

A police pension board has the explicit power to pay all necessary expenses.<sup>225</sup> Another important pension board function under Article 3 is the payment of benefits to participants and beneficiaries. By law, pension payments from the fund are made by the pension board by a certificate of payment signed by the president and secretary of the pension board.<sup>226</sup> Any payment that is ordered must be reflected in the meeting minutes of the pension board's proceedings.

**I. §5.14 PENSION FUND ADMISSIBILITY**

Another power of the pension board concerns the admission of pension fund participants. However, a police pension board no longer has the power to deny membership into the pension fund based upon physical or mental condition.<sup>227</sup> However, membership is not automatic. The police officer still has the obligation to make application for membership within three months after receiving his or her first appointment or reappointment.<sup>228</sup> The Pension Code does not specify what happens if a police officer fails to apply for membership into the pension fund within three months from

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<sup>224</sup> See, Evanston Police Pension Board vs. City of Evanston, 281 Ill.App.3d 1042, 667 N.E.2d 657, 217 Ill.Dec. 568 (1996).

<sup>225</sup> 40 ILCS 5/3-138.

<sup>226</sup> 40 ILCS 5/3-133.

<sup>227</sup> 40 ILCS 5/3-106.

<sup>228</sup> *Id.*; See, Young vs. Worth Police Pension Board, 57 Ill.App.3d 689, 373 N.E.2d 708, 15 Ill.Dec. 362 (1978).

appointment. However, case law holds that the failure to apply within the 90 day deadline renders the police officer ineligible to participate in the pension fund.<sup>229</sup>

**M. §5.15        COMPENSATION TO TRUSTEES**

Police pension trustees are prohibited from receiving a salary or any compensation for services rendered to the pension fund.<sup>230</sup> A trustee would be entitled to reimbursement for any out-of-pocket expenses incurred on behalf of the pension fund. Reimbursement of such expense should be made only upon presentation of written documentation of the expense and upon approval by a majority of trustees.

**N. §5.15        DELEGATION OF PENSION FUND POWERS**

The pension board may delegate a number of its powers or duties to others. However, the pension board cannot delegate its duty to adjudicate pension claims. The Code allows pension boards to appoint one or more fiduciaries to perform certain duties, manage, acquire or dispose of assets.<sup>231</sup> It has been held by the courts that a pension board may also retain legal counsel for advice and representation.<sup>232</sup> Competent and independent legal counsel is a necessity for any pension fund.

**O. §5.17        ROLE OF THE TREASURER**

The municipalities treasurer also has certain powers under Article 3 of the Pension Code. The treasurer is the custodian of the pension fund's assets and keeps the books and accounts of the pension fund under rules prescribed by the pension board. The treasurer holds such assets subject to the control and direction of the board.<sup>233</sup> The treasurer is not a pension board trustee under Article 3 unless he has been appointed as such.

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<sup>229</sup> Donnells vs. Woodridge Police Pension Board, 159 Ill.App.3d 735; 512 N.E.2d 1082; 111 Ill.Dec. 541 (1987); Young, supra.

<sup>230</sup> 40 ILCS 5/3-128.

<sup>231</sup> 40 ILCS 5/1-109.1(a).

<sup>232</sup> Braun vs. Retirement Board, 125 Ill.App.3d 132, 465 N.E.2d 589, 80 Ill.Dec. 477 (1984).

<sup>233</sup> 40 ILCS 5/3-132.

The treasurer is required to be bonded. In case of breach of the bond, suit may be brought by any person or persons injured by such breach. The pension board should always obtain a copy of the treasurer's bond.

## **CHAPTER 6**

### **DUTIES AND LIABILITIES OF PENSION BOARD TRUSTEES AND FIDUCIARIES**

- A. §6.1 INTRODUCTION
- B. §6.2 CRIMINAL LIABILITY
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- F. §6.10 THE PROHIBITED TRANSACTIONS RULE
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- G. §6.19 DELEGATION OF FIDUCIARY DUTIES
- H. §6.20 INDEMNIFICATION OF TRUSTEES

I. §6.21

## CONCLUSION

## CHAPTER 6

### **DUTIES AND LIABILITIES OF PENSION BOARD TRUSTEES AND FIDUCIARIES**

#### A. §6.1 **INTRODUCTION**

As indicated throughout this book, pension board trustees are by law, fiduciaries and they have numerous important duties and responsibilities, which are discussed in detail here. The failure of a trustee or fiduciary to adequately carry out those duties and responsibilities are also the subject of this

Chapter. The Pension Code imposes both criminal and civil liability upon pension trustees who breach their fiduciary duties or fail to carry out their responsibilities.

**B. §6.2        CRIMINAL LIABILITY**

If a trustee or any other person makes a false entry or statement upon any book or document pertaining to any pension fund or upon any report of exhibit filed with the Department of Insurance, with the intent to deceive the Department or its employees, the individual can be charged with a Class A misdemeanor.<sup>234</sup> To date, there are no reported cases dealing with criminal liability under the Pension Code.

**C. §6.3        CIVIL LIABILITY**

A pension board or trustee may be fined by the Department of Insurance in an amount of up to \$1,000.00 for failing to comply with an order of the Department which has been issued after notice and hearing.<sup>235</sup> A trustee that refuses to testify or turn over books and records in response to a Department subpoena can also be subject to contempt proceedings in the circuit court.<sup>236</sup>

Trustees who have breached any fiduciary duty can be personally liable to the pension fund for any losses incurred by the fund as a result of the breach.<sup>237</sup> A trustee who violates his or her fiduciary duty to the pension fund may also be subject to removal from the pension board.<sup>238</sup> In addition, trustees can be sued by participants, beneficiaries or the Illinois Attorney General.<sup>239</sup>

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<sup>234</sup> 40 ILCS 5/22-507.

<sup>235</sup> 40 ILCS 5/22-509.

<sup>236</sup> 40 ILCS 5/22-206.

<sup>237</sup> 40 ILCS 5/1-114, 5/1-115.

<sup>238</sup> 40 ILCS 5/1-14.

There are no reported decisions under Illinois law construing the scope and extent of a trustee's civil liability. Since the liability provisions are similar to those under the Employment Retirement Income Security Act,<sup>240</sup> case law dealing with the liability of pension trustees under that law may provide guidance. Under ERISA, trustees have been removed from their positions and ordered to personally prepay money to the fund.<sup>241</sup> ERISA case law holds that a trustee who has personally profited by breaching his fiduciary duty to the pension fund can be required by the court to turn over any profits he received, even though there was no actual financial loss to the pension fund.<sup>242</sup> Under ERISA, beneficiaries can recover compensatory damages proximately caused by a trustee's breach of any fiduciary duty.<sup>243</sup> A federal court also has the power to appoint a receiver as a means of remedying breaches of fiduciary duties under ERISA.<sup>244</sup> All of these cases could easily have application under Illinois law. However, under the Code, no person can be liable with respect to a breach of fiduciary duty if such breach occurs before the person becomes fiduciary or after the person ceased being a fiduciary.<sup>245</sup>

In order to avoid fiduciary liability, pension board trustees should take great care to document all actions with respect to administration of the pension fund and the management and control of fund assets. Complete written minutes should reflect the action taken, how each trustee voted, including

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<sup>239</sup> 40 ILCS 5/1-115.

<sup>240</sup> 29 U.S.C. §§1001-1461 (ERISA).

<sup>241</sup> Eaves vs. Penn, 587 F.2d 453 (10th Cir. 1978); Iron Workers vs. Bowen, 624 F.2d 1255 (5th Cir. 1980).

<sup>242</sup> Leigh vs. Engle, 727 F.2d 113 (7th Cir. 1984).

<sup>243</sup> Russell vs. Massachusetts Mutual Life Insurance, 722 F.2d 482 (9th Cir. 1983).

<sup>244</sup> Marshall vs. Snyder, 572 F.2d 984 (2nd Cir. 1978).

<sup>245</sup> 40 ILCS 5/1-114(b).

notation of who objected. If a trustee objects on the grounds that any action would violate the fiduciary responsibility provision of the Pension Code, the minutes should reflect such objections.

#### **D. §6.4 DUTIES OF PENSION TRUSTEES**

As previously indicated in this book, Illinois pension law imposes a significant number of duties and obligations upon pension board trustees. If these duties are violated, the trustees can be subject to liability.

First and foremost, as pointed out in Chapter 2, pension trustees are fiduciaries who must follow strict fiduciary standards. In addition, pension trustees are subject to additional statutory obligations which are as follows:

- (1) The Exclusive Purpose Rule;<sup>246</sup>
- (2) The Prudent Person Rule;<sup>247</sup>
- (3) The Diversification Rule;<sup>248</sup>
- (4) The Prohibited Transactions Rule.<sup>249</sup>

These basic standards of care form the foundation of pension trustee's duties to the fund.

In addition to the duties stated above, a pension trustee must always act in accordance with all of the other provisions of Article 3, dealing with police pension funds.<sup>250</sup> As such, it is important for pension trustees to be familiar with their statutory obligations imposed under the Pension Code. If a trustee violates any of these provisions, a breach of fiduciary duty has occurred.

#### **1. §6.5 THE EXCLUSIVE PURPOSE RULE**

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<sup>246</sup> 40 ILCS 5/1-109(a).

<sup>247</sup> 40 ILCS 5/1-109(b).

<sup>248</sup> 40 ILCS 5/1-109(c).

<sup>249</sup> 40 ILCS 5/1-110.

<sup>250</sup> 40 ILCS 5/1-109(d).

Section 1-109 of the Pension Code requires a trustee to carry out his or her duties with respect to the pension fund solely in the interests of the participants and beneficiaries and;

- (a) For the exclusive purpose of:
  - (1) providing benefits to participants and their beneficiaries; and
  - (2) defraying reasonable expenses of administering the pension fund.<sup>251</sup>

The decisions of pension fund fiduciaries must be made with an intention fixed exclusively on the interests of the pension fund's participants and beneficiaries. The exclusive purpose rule is essentially a codification of common-law trust principles.<sup>252</sup> Trustees of a pension fund do not violate their duties under the exclusive purpose rule by taking action that promotes the interests of participants and beneficiaries and also provides an incidental benefit to other third parties or even to the trustees themselves.<sup>253</sup>

As a fiduciary, the pension trustee's duty is to serve the interests of beneficiaries with complete loyalty, excluding all self-interest. This "exclusive purpose" rule prohibits a trustee from dealing with the trust property for his individual benefit. A violation of the exclusive purpose rule usually arises where the trustee has conflicting interests and divided loyalty. When it is found that the conduct of the trustees of a pension fund have been arbitrary, capricious or in bad faith, it is likely that the trustees have also breached their fiduciary duty under the law in that they failed to discharge their duties for the sole benefit of the pension fund's participants and beneficiaries.

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<sup>251</sup> 40 ILCS 5/1-109(a)(1) & (2).

<sup>252</sup> Barrington Police Pension Board vs. Department of Insurance, 211 Ill.App.3d 698, 570 N.E.2d 622 (1991).

<sup>253</sup> Barrington Police Pension Board vs. Department of Insurance, *supra*; Holliday vs. Xerox Corp., 732 F.2d 548 (6th Cir. 1984); Donovan vs. Bierwirth, 680 F.2d 263 (2nd Cir. 1982).

One Illinois case has held that the trustees of a pension board did not violate the exclusive purpose rule by establishing a mortgage loan program that would only be available to certain members of the pension fund.<sup>254</sup> The court reasoned that the exclusive purpose rule was not violated because the pension board applied the same eligibility rules to all pension fund members and made participation in the program available to all participants and beneficiaries on a reasonably equivalent basis.

## **2. §6.6 THE PRUDENT PERSON RULE**

Under the law, a pension trustee must also discharge his or her duties with respect to the pension fund in the following manner:

With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of enterprise of a like character with like aims.<sup>255</sup>

The above provision comes from both the common law of trusts and from an almost identical provision in ERISA.<sup>256</sup>

The prudent person rule contemplates a duty on the part of a pension trustee to make an independent inquiry into the merits of each particular decision. A trustee's lack of familiarity with a particular subject is no excuse for making an unwise or uninformed decision.

### **a. §6.7 ILLINOIS CASES DEALING WITH THE PRUDENT PERSON RULE**

Under Illinois law, a trustee is obligated to act with the highest degree of fidelity and with the utmost good faith toward beneficiaries.<sup>257</sup> A trustee must act in good faith in the management of all

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<sup>254</sup> Barrington Police Pension Board vs. Department of Insurance, supra.

<sup>255</sup> 40 ILCS 5/1-109(b).

<sup>256</sup> 29 U.S.C. §1104(a)(1)(B). The Illinois courts will often look to ERISA when deciding cases under the prudent person rule. See, Barrington Police Pension Board vs. Department of Insurance, supra.

<sup>257</sup> Tankersly vs. Albright, 374 F.Supp. 538 (N.D. Ill. 1974).

matters relating to the trust, and employ such vigilance as prudent men of intelligence ordinarily employ in their own affairs.<sup>258</sup> A trustee may not, under Illinois law, engage in self dealing in the performance of his duties as a trustee which results in a loss to the trust.<sup>259</sup> A trustee under Illinois law is not an insurer of results and is not responsible for mere errors in judgment or mistakes.<sup>260</sup> These decisions generally define the duties and degree of care that the Illinois courts may impose under the Illinois Pension Code. A pension board's implementation of a mortgage loan program which earned less than the market rate of interest did not, as a matter of law, constitute a violation of the prudent person rule.<sup>261</sup>

**b. §6.8 ERISA GUIDELINES**

As indicated above, the language of §1-109(b) establishing the prudent person standard under the Pension Code is almost identical with the language contained in ERISA. Thus, guidelines for making prudent decisions under ERISA are helpful in determining whether a decision is prudent under the Illinois Pension Code. The failure to independently investigate or properly evaluate a pension board decision under ERISA has led the courts to rule that the trustee violated the prudent person rule.<sup>262</sup>

Under ERISA, numerous cases have held that a pension trustee breaches his or her fiduciary duties by failing to collect delinquent pension contributions.<sup>263</sup> If there is a possibility of an underfunding problem, pension trustees have a fiduciary duty to investigate whether appropriate

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<sup>258</sup> Hatfield vs. First National Bank of Danville, 317 Ill.App.169 (1942).

<sup>259</sup> Gostomske vs. Sommerfield, 15 Ill.App.2d 478, 146 N.E.2d 702 (1957).

<sup>260</sup> Pank vs. Chicago Title & Trust Co., 314 Ill.App. 53, 40 N.E.2d 787 (1942).

<sup>261</sup> Barrington Police Pension Board vs. Department of Insurance, *supra*.

<sup>262</sup> Brock vs. Robbins, 830 F.2d 640 (7th Cir. 1987).

<sup>263</sup> Schaefer vs. Arkansas Medical Society, 853 F.2d 1987 (8th Cir. 1988); Bidwell vs. Garvey, 743 F.Supp. 393 (D.C.Md. 1990).

contributions are being made and take legal action to rectify the underfunding problem caused by the municipality.<sup>264</sup>

**E. §6.9        THE DIVERSIFICATION RULE**

The Pension Code<sup>265</sup> requires trustee to diversify investments so as to avoid the risk of large losses. The statute does not set forth any formula for diversification or set any specific investment limitations. But the message under the diversification rule is clear – don’t put large amounts of pension fund assets in a single investment. The Pension Code specifically requires diversification as to certain investments by placing limitations on how much of a pension fund’s portfolio can be invested. Diversification is required unless it would be “clearly prudent not to do so.” This means that if investment diversification does not occur, the burden is on the pension board failing to diversify to justify why it did not do so.

**F. §6.10        THE PROHIBITED TRANSACTIONS RULE**

General fiduciary obligations under Article 1 of the Pension Code are supplemented by the specific prohibitions found in 40 ILCS 5/1-110. The Prohibited Transactions provisions contained in 40 ILCS 5/1-110 are almost identical to the provisions contained in ERISA,<sup>266</sup> which deal with pension plans in the private sector.

**1. §6.11 PROHIBITED CONDUCT**

The prohibited transactions provision is broken down into two parts. The first part states:

- (a) A fiduciary with respect to a retirement system or pension fund shall not cause the retirement system or pension fund to engage in a transaction if he

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<sup>264</sup> Morse vs. Adams, 857 F.2d 339 (6th Cir. 1988).

<sup>265</sup> 40 ILCS 5/1-109(c).

<sup>266</sup> 29 U.S.C. §1106.

or she knows or should know that such transaction constitutes a direct or indirect:

- (1) Sale or exchange, or leasing of any property interest for less than adequate consideration, to a party in interest or from a party in interest to a retirement system or pension fund for more than adequate consideration.
- (2) Lending of money or other extension of credit from the retirement system or pension fund to a party in interest without the receipt of adequate consideration and a reasonable rate of interest, or from a party in interest to a retirement system or pension fund with the provision of excessive security or an unreasonable high rate of interest.
- (3) Furnishing of goods, services or facilities from the retirement system or pension fund to a party in interest for less than adequate consideration, or from a party in interest to a retirement system or pension fund for more than adequate consideration.
- (4) Transfer to, or use by or for the benefit of, a party in interest of any assets of a retirement system or pension fund for less than adequate consideration.<sup>267</sup>

There are four separate and distinct prohibitions in this subsection.

The second part of the provision states:

- (b) A fiduciary with respect to a retirement system or pension fund established under this Code shall not:
  - (1) Deal with the assets of the retirement system or pension fund in its own interest or for his own account;
  - (2) In his individual or any other capacity act in any transaction involving the retirement system or pension fund on behalf of a party whose interests are adverse to the interests of the retirement system or pension fund or the interests of its participants or beneficiaries; or
  - (3) Receive any consideration for his own personal account from any party dealing with the retirement system or pension fund in connection with a transaction involving the assets of the retirement system or pension fund.<sup>268</sup>

There are three areas of prohibited conduct in this subsection.

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<sup>267</sup> 40 ILCS 5/1-110(a)(1)-(4).

<sup>268</sup> 40 ILCS 5/1-110(b)(1)-(3).

The above prohibitions show a legislative intent to police certain trustee conduct and prevent abuses by trustees of pension fund assets with regard to transactions involving other fiduciaries or other parties known as “parties in interest” under the Pension Code. There is very little Illinois case law construing the above statute. Given the fact that the State of Illinois essentially adopted section 1-110 from ERISA, cases decided under that federal law are helpful when analyzing this law. Illinois courts often rely on ERISA case law when deciding cases under the Illinois Pension Code.<sup>269</sup>

## **2. §6.12 COMPARING THE PROHIBITIONS**

There are two basic types of prohibited transactions established in the Pension Code. The first group, set out in 40 ILCS 5/3-110(a) are “technical” in that they may not involve any actual or potential conflict of interest, but will always involve a transaction between a pension board or a trustee and one or more parties in interest. The second group of prohibitions, set out in 40 ILCS 5/3-110(b), normally involves actual or potential conflicts of interest or self-dealing by pension board trustees or fiduciaries.

## **3. §6.13 WHO IS A PARTY IN INTEREST**

Many of the prohibited transactions enumerated above involve transactions with those known as parties in interest.<sup>270</sup> Thus, it is important for Illinois public pension trustees to know who is considered a party in interest. The definition of party in interest is very broad and covers all of the following and more:

- (a) pension board trustees;
- (b) fiduciaries;
- (c) board attorneys;
- (d) pension fund employees;

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<sup>269</sup> See, Barrington Police Pension Board, vs. Department of Insurance, 211 Ill.App.3d 698, 156 Ill.Dec. 145 (1991).

<sup>270</sup> 40 ILCS 5/1-101.3.

- (e) service providers, i.e., actuaries, accountants, auditors, insurance agents, consultants;
- (f) any relatives of the above;
- (g) the municipality, its officers and directors; and
- (h) a union whose members are covered by the retirement system or pension fund, its directors and officers.

The existence of party in interest status may not always be obvious. In almost every transaction, the pension board should determine whether or not the transaction involves a party in interest.

**a. §6.14 SALE, EXCHANGE OR LEASE OF PROPERTY**

There can be transactions between a pension board and a party in interest under the Illinois Pension Code, as long as there is adequate consideration. However, under the Illinois Pension Code, pension board trustees as fiduciaries, cannot sell, lease or exchange property to a party in interest for less than adequate consideration. For example, if a pension fund owns real estate with a fair market rental value of \$10,000.00 per month and the pension board leases the property to the wife of one of the board trustees for \$5,000.00 per month, this is a prohibited transaction.

The flip side of this prohibition also applies. A pension board or fund cannot buy, lease or exchange any property from a party in interest for more than adequate consideration. For example, if the mayor of a municipality owns a computer store and a pension board buys a computer for \$3,000.00 which sells for \$1,500.00 at another retailer, a prohibited transaction has occurred. The determination of what is adequate consideration is a factual question that will need to be determined on a case by case basis.

**b. §6.15 LOANS TO OR FROM A PARTY IN INTEREST**

Pension Board trustees cannot loan or extend credit to a party in interest without receiving adequate consideration and a reasonable rate of return. Conversely, a party in interest cannot loan

money or extend credit to a pension fund with a provision of excessive security or an unreasonably high interest rate. Once again, what is an unreasonable interest rate will depend upon the facts in each particular case.

**c. §6.16 FURNISHING OF GOODS OR SERVICES**

If a pension board furnishes goods or services to a party in interest for less than adequate consideration or receives goods and services and pays more than adequate consideration, a prohibited transaction has occurred.<sup>271</sup> Thus, it is important for a pension board to determine whether what is paid to service providers, such as attorneys, actuaries, and accountants, is reasonable and not excessive.

**d. §6.17 TRANSFER OF ASSETS**

Assets of the pension fund cannot be transferred to a party in interest for less than adequate consideration.<sup>272</sup> In one case, it was held that the acquisition of an aircraft by the trustees of a pension fund governed by ERISA constituted a prohibited transaction where the aircraft had initially belonged to a labor union to which the beneficiaries of the pension fund belonged.<sup>273</sup>

**4. §6.18 CONFLICT OF INTEREST PROHIBITIONS**

The second facet of prohibited transactions deals with what would be considered conflicts of interest. A pension trustee cannot deal with assets of the pension fund for his or her own interest or account.<sup>274</sup> A trustee cannot engage in any transaction which would be adverse to the interest of the pension fund or its participants and beneficiaries.<sup>275</sup> Finally, a trustee cannot personally profit from any transaction involving the assets of the pension fund.<sup>276</sup>

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<sup>271</sup> 40 ILCS 5/1-110(a)(3).

<sup>272</sup> 40 ILCS 5/1-110(a)(4).

<sup>273</sup> McDougall vs. Donovan, 539 F.Supp. 596 (N.D.Ill 1982).

<sup>274</sup> 40 ILCS 5/1-110(b)(1).

<sup>275</sup> 40 ILCS 5/1-110(b)(2).

However, nothing in this Code provision prohibits a trustee from receiving any benefit the trustee may be entitled to under the Code.<sup>277</sup> In addition, a trustee is entitled to receive reimbursement of any expenses incurred in the performance of pension fund business.<sup>278</sup>

#### **G. §6.19        DELEGATION OF FIDUCIARY DUTIES**

The Pension Code allows pension trustees to allocate and delegate many of their duties, including fiduciary duties.<sup>279</sup> The reason for this provision is two-fold. First, it allows a pension board to retain skilled professionals, such as attorneys and investment managers to assist in the administration of the pension fund. Second, the pension board is relieved of the responsibility of meeting every time an administrative decision must be made. If a person is delegated a fiduciary duty, that person likewise becomes a fiduciary.

A trustee or fiduciary to whom a specified duty has not been allocated is not responsible for any act or omission of the fiduciary to whom that duty has been allocated. A trustee is, however, always responsible for his own acts. A trustee must use reasonable care to prevent any other trustee from committing a breach of any duty. This means that a trustee cannot sit back and watch another trustee breach a fiduciary duty.

#### **H. §6.20        INDEMNIFICATION OF TRUSTEES**

A pension fund may indemnify and protect trustees, employees, and consultants against all damage claims and lawsuits for negligent acts committed in the scope of employment by the fund. However, there can be no indemnification for willful misconduct or gross negligence.<sup>280</sup> In addition,

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<sup>276</sup> 40 ILCS 5/1-110(b)(3).

<sup>277</sup> 40 ILCS 5/1-110(c)(1).

<sup>278</sup> 40 ILCS 5/1-110(c)(2).

<sup>279</sup> 40 ILCS 5/1-109.1.

<sup>280</sup> 40 ILCS 5/1-108(a).

there is no right to indemnification to claims for bodily injury or damage to property arising out of motor vehicle accidents. A pension fund can insure against loss of liability of its trustees and staff with any insurance company licensed to write such coverage in Illinois.<sup>281</sup>

If a pension trustee acts in good faith, the trustee may be entitled to qualified immunity under State or federal law as to certain tort claims.

**I.      §6.21            CONCLUSION**

Pension trustees are in a sense, CEOs of the pension fund. Trustees have a great deal of responsibility and with that responsibility comes the potential for liability. The best way to avoid liability is to become familiar with the Pension Code's legal requirements and to retain competent professionals to assist the board in the administration of the pension fund.

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<sup>281</sup> 40 ILCS 5/1-108(c).

## **CHAPTER 7**

### **FUNDING OF PENSIONS UNDER ARTICLE 3**

- A. §7.1 INTRODUCTION
- B. §7.2 THE PUBLIC PENSION FUND CRISIS
- C. §7.3 MUNICIPAL FUNDING
- 1. §7.4 DETERMINATION OF ANNUAL CONTRIBUTION AMOUNTS
- D. §7.5 ACTUARIAL DETERMINATIONS
- 1. 1. §7.6 THE ACTUARIAL PROCESS
  - a. §7.7 SELECTING AN ACTUARY
- E. §7.8 PARTICIPANT FUNDING
- 1. §7.9 PICK UP OF CONTRIBUTIONS
- F. §7.10 GIFTS AND DONATIONS
- G. §7.11 INVESTMENT INCOME AND INTEREST ON DEPOSITS
- H. §7.12 FUNDING RESERVES
- I. §7.13 UNDERFUNDING
- J. §7.14 STATUTORY UNDERFUNDING PROTECTIONS
  - 1. §7.15 FIDUCIARY DUTIES CONCERNING UNDERFUNDING
- K. §7.16 INSUFFICIENT FUNDS

## **CHAPTER 7**

### **FUNDING OF PENSIONS UNDER ARTICLE 3**

- A. **§7.1 INTRODUCTION**

Obviously, in order for police pension funds to exist and for benefits to be paid to participants and beneficiaries, the pension system must be funded. Money must be paid into the pension fund in order to make the fund financially viable. A police pension can be funded four different ways under Article 3. These are:

- (1) by taxes levied on the taxable property in the municipality;<sup>282</sup>
- (2) by mandatory contributions from police officers;<sup>283</sup>
- (3) by donations and gifts;<sup>284</sup> and
- (4) by investment of pension fund assets.

The two main funding vehicles are tax levies and the individual police officer's contributions.

However, the investment of pension fund assets also plays an important role in the funding of police pensions.

As discussed in greater detail in Chapter 5, the control and management of a police pension fund is vested solely in the fund's board of trustees.<sup>285</sup> This responsibility includes the duty of making sure that all contributions required for the benefit of the pension fund are paid in accordance with the Pension Code. Indeed, the failure to make sure that the necessary contributions are paid by the municipality, may violate the trustee's fiduciary duties under the exclusive purpose rule or the prudent person rule. In addition, failure of the pension board to make sure that pension fund contributions are made as required by law, may result in compliance proceedings and the assessment of penalties against the pension board by the Illinois Department of Insurance.<sup>286</sup>

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<sup>282</sup> 40 ILCS 5/3-125.

<sup>283</sup> 40 ILCS 5/3-125.1.

<sup>284</sup> 40 ILCS 5/3-140.1.

<sup>285</sup> 40 ILCS 5/3-132.

<sup>286</sup> 40 ILCS 5/22-509.

**B. §7.2        THE PENSION FUNDING CRISIS**

For many months now, the Illinois media has been discussing the “pension crisis” facing Illinois public pension funds, including Article 3 police pension funds. Many accusations have been made. Many solutions have been proffered. The accusations and solutions differ, depending upon what point of view is being espoused. In order to clarify this pension crisis, a number of distinctions need to be made. First, not every Illinois pension system is the same as far as pension fund management is concerned or as far as benefits paid, funding levels or administration.

The problem has not been the administration of police and firefighter pension boards under Article 3 and 4 of the Pension Code. The problem has been with the Illinois Legislature and some municipalities that have ignored their funding requirements under the Pension Code! As one commentator noted:

The challenges facing Illinois pension funds today have existed for many years. The State of Illinois and many municipalities across the state of have historically not properly funded their respective retirement plans. A pension crisis nearly forty years ago led the State, in 1971, to enact a constitutional guarantee of government sponsored pensions. Since then, three separate court cases involving employer funding of public sector employee pensions were argued all the way to the Illinois Supreme Court. In *The People ex rel Illinois Federation of Teachers, AFT, AFL-CIO vs. Lindberg*, 60 Ill.2d 266 (1975), *McNamee vs. State of Illinois*, 173 Ill.2d 433 (1996) and *The People ex rel Sklodowski vs. The State of Illinois*, 182 Ill.2d 220 (1998) the Court held that the concerned employees did not have a right to compel their respective government employers to make appropriate contributions unless the retirement plan became insolvent and unable to pay the benefits promised.

In light of the Illinois Supreme Court’s decisions, the State of Illinois, the City of Chicago and many municipalities throughout the state however, continued to fail in adequately funding their retirement systems. While the Illinois Supreme Court historically has upheld or overturned other decisions based on public policy reasons, allowing legislators to put the State in a massive fiscal crisis, ignore the very real and imminent threat to the retirement security of innocent public servants were not the type of public policy issues which the Court felt compelled to take a leadership stand on. The Illinois Supreme Court essentially nurtured the current crisis

by giving state and municipal elected leaders the green light to ease budget problems, keep property taxes as low as possible and protect pet projects at the expense of the retirement plans and an unsuspecting taxpayer.<sup>287</sup>

Each of the various Illinois public pension funds is different in a number of ways. These include participant and beneficiary makeup, scope and extent of benefits paid, funding requirements and investment performance. However, if there is one common denominator as to the current financial status of Illinois public pension funds, it is the failure of employing entities, be it the State of Illinois or local governmental entities, to make the necessary annual pension contributions to Illinois public pension funds. As one commentator put it:

Many commentators on the subject blame the economy for the current pension crisis. It is definitely a contributing factor. However, when times were good, the State of Illinois, the City of Chicago, and many municipalities throughout the State did not make the necessary actuarial required employer contributions to their retirement systems. It should also be noted that when the economy worsened, the same legislators again chose to kick the can down the road, failing to make necessary employer actuarial required contributions. In every economic environment, our legislators have failed to properly fund the retirement systems causing the costs to pay for the promises that have been made to public employees throughout much of the State to skyrocket.<sup>288</sup>

For the most part, the Illinois Legislature's approach to the funding problems of its public pension funds was to cut benefits, which took place with the recent amendments that were put into law on January 1, 2011. A two-tiered pension system is now in effect that provides for decreased benefits for police officers hired on or after January 1, 2011.<sup>289</sup> This two-tiered pension system will not solve the current financial problems of some Article 3 police pension funds because it will be many years before pension benefits will be paid to police officers hired after January 11, 2011.

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<sup>287</sup> Martin, Illinois Pension Crisis in a “Nutshell”, 2011.

<sup>288</sup> *Id.*

<sup>289</sup> 40 ILCS 5/3-111(d).

What has been proposed in some circles is to reduce the pension benefits of police officers hired before 2011. Any attempts to change the pension benefits of police officers employed prior to 2011 will certainly face legal challenges because such benefits are protected under the Illinois Constitution.<sup>290</sup>

#### C. §7.3 MUNICIPAL FUNDING

Municipal funding of Article 3 police pension funds is required in order to ensure that pensions will be paid to participants and beneficiaries at some future point in time when such pension benefits become due and owing. This funding is accomplished by the annual levy of a tax on all of the taxable property of the municipality.<sup>291</sup> Under the Pension Code, the levy amount is to be at a rate which will produce an amount of money, when combined with the deductions from the police officer's salaries and investment income, will equal a sufficient amount of money to meet the annual requirements of the pension fund.

The annual requirements of the municipal tax levy consist of two components. These are:

- (1) The normal costs of paying benefits and administering the pension fund for the year involved; and
- (2) an additional amount sufficient to bring the pension fund's assets up to 90% of the fund's total actuarial liabilities by the end of the fiscal year 2040.<sup>292</sup>

This second component has been one of the causes to the police pension funding problem in Illinois because the Illinois Legislature keeps extending the funding date. In January of 1993, the Illinois Legislature amended the funding provisions contained in Article 3 to allow municipalities an additional

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<sup>290</sup> Article XIII, §5 of the Illinois Constitution of 1970 provides in pertinent part:

Membership in any pension or retirement system of the State, any unit of government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired. Ill.Const. Art. XIII, §5 (1970).

<sup>291</sup> 40 ILCS 5/3-125(a).

<sup>292</sup> *Id.*

13 ½ years to become fully funded. The IPPFA challenged this change, contending that the amendment violated the Illinois Constitution. A direct appeal was taken to the Illinois Supreme Court. In reversing the trial court, the supreme court held that the constitutional protection contained in Article XIII, section 5 protects only the right to receive benefits and does not protect general pension rights of public employees or pension funding levels established under previous laws.<sup>293</sup> This case would seem to allow the legislature to continually change pension funding levels.

This is exactly what happened with the pension amendments in 2010.<sup>294</sup> Full funding is no longer required. Police pension funds need only be 90% funded and this finding deadline has been extended to the year 2040.<sup>295</sup>

#### **1.     §7.4 DETERMINATION OF ANNUAL CONTRIBUTION AMOUNTS**

The two funding components set out above must be determined by an enrolled actuary employed by the Illinois Department of Insurance or retained by the Pension Board or the municipality.<sup>296</sup> In making these determinations, the required municipal contribution is calculated each year as a level percentage of payroll over the years remaining up to and including the funding deadline of fiscal year 2040.

Also, for purposes of determining the required municipal contributions to the pension fund, the actuarial value of the pension fund's assets shall be calculated as follows:

- (1)    On March 30, 2011, the actuarial value of the pension fund's assets shall be equal to the market value of the assets as of that date.

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<sup>293</sup> McNamee vs. State of Illinois, 173 Ill.2d 433, 672 N.E.2d 1159, 220 Ill.Dec. 147 (1996).

<sup>294</sup> S.B. 3538, enacted as Public Law 096-1495.

<sup>295</sup> 40 ILCS 5/3-125(a).

<sup>296</sup> *Id.*

- (2) In determining the actuarial value of the pension fund's assets after March 30, 2011, any actuarial gains or losses from investment return incurred in a fiscal year shall be recognized in equal amounts over a five year period following that fiscal year.<sup>297</sup>

#### D. **§7.5 ACTUARIAL DETERMINATIONS**

As indicated in the preceding section, the determination of the municipality's annual contribution to the police pension fund requires the services of an enrolled actuary. The necessary actuarial determinations can either be made by the an actuary from the Department of Insurance or an actuary required by the pension board or the municipality.<sup>298</sup>

In most instances, the municipality will levy the amount of taxes sufficient to meet the funding requirements set out in the statute. However, when the municipality attempts to levy an amount of taxes lower than that indicated under the Pension Code, the pension board should seek to determine how the municipality arrived at its calculations. The pension board should challenge the municipality's figures if they are inaccurate or significantly less than the amounts recommended by other actuaries.<sup>299</sup> This will normally require the pension board to retain its own actuary to make its own determinations as to the actuarial requirements of the pension fund.

It is important to remember that actuaries may often differ in their assessments and determinations. Then what occurs is a battle of experts.

#### 1. **§7.6 THE ACTUARIAL PROCESS**

An actuary is an expert in certain fields of mathematics and statistics. The actuary's function is to analyze certain pension fund data and assess whether contributions are adequate to pay for disability and retirement pensions that will be distributed in the future. One of the primary functions of the

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<sup>297</sup> 40 ILCS 5/3-125(b).

<sup>298</sup> 40 ILCS 5/3-125(a).

<sup>299</sup> See e.g., Evanston Police Pension Board vs. City of Evanston, 281 Ill.App.3d 1047, 667 N.E.2d 657, 217 Ill.Dec. 568 (1996).

actuary is to make an actuarial evaluation of the pension fund. This evaluation is a “snapshot” of the pension fund at a certain point in time or date (valuation date), taken to report the current financial status of the pension fund and its ability to meet future funding obligations.

To make these actuarial evaluations, the actuary reviews financial data pertaining to the pension fund as well as information relating to each participant and beneficiary. Once the actuary is provided with this data, he or she makes certain “actuarial assumptions.” These “actuarial assumptions” include, but are not limited to the following:

- (a) Future investment return;
- (b) withdrawal or turnover rates – the probability that an active participant may terminate employment during a year;
- (c) Mortality rates – the probability that a participant (active, deferred, vested or retired) may die during a year;
- (d) Disability rates – the probability that a participant may become disabled during a year;
- (e) Retirement rates – the probability that a participant may retire during a year;
- (f) Expenses – the estimated amount of plan expenses paid out of the fund during a year;
- (g) Benefit accrual during the year – the amount of benefits earned during the year (and future years) by a plan participant;
- (h) Rate of salary increases – if the benefit formula is based on salary levels, an assumption regarding future salary increases may also be appropriate in the actuarial valuation.<sup>300</sup>

These actuarial assumptions determine the future overall liabilities of the pension fund and the anticipated overall periodic costs of the pension fund. These assumptions normally change on a yearly basis.

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<sup>300</sup> Weinberg, The Actuarial Process, Trustees Handbook (1989).

Contributions that have been actuarially determined must exceed the minimum funding requirements or a funding deficiency will occur. A funding deficiency indicates that the pension fund is being funded too slowly and insufficient funds are being collected to pay for projected benefits.

**a. §7.7 SELECTING AN ACTUARY**

Since the Pension Code specifically allows Article 3 Pension Funds to utilize their own actuaries, it is suggested that pension boards consider retaining their own independent actuary. The following criteria may be helpful when selecting an actuary for the pension fund:

- (a) What are the actuary's professional qualifications? The actuary should be a member of a recognized actuarial organization and an Enrolled Actuary under ERISA?
- (b) What are the fees to be charged?
- (c) What is the estimated length of time necessary to complete the actuarial duties?
- (d) How much experience does the actuary have with public funds? Public pension funds operate in a unique environment and have problems that are considerably different from those of pension plans in the private sector;
- (e) Who will be actually performing the assignment? Will it be the person making the presentation, or someone else?
- (f) Does the actuary who will be performing the assignment have the ability to discuss actuarial concepts in laymen's terms?
- (g) Does the actuary who will be performing the assignment have experience in working with the provisions of the Illinois Pension Code, particularly those pertaining to police and firefighters' pension funds?<sup>301</sup>

**E. §7.8 PARTICIPANT FUNDING**

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<sup>301</sup> Sandor Goldstein, Actuarial Selection, Illinois Public Pension Institute, July 1990.

The second major source of police pension funding comes from the contributions of the participants. The contributions of the police officers are mandatory and are deducted at an annual rate of 9.91% of the officer's salary.<sup>302</sup> Such sums are deducted monthly.

Salary means annual salary attached to the officer's rank as established by the municipality's appropriation ordinance, including any compensation in the salary included for overtime pay. Contributions do not have to be made for monies received as:

- (a) overtime pay;
- (b) holiday pay;
- (c) bonus pay;
- (d) merit pay;
- (e) or any other cash benefit not included in the officer's established salary.<sup>303</sup>

Thus, problems sometimes arise as to whether the monetary benefit paid to the officer should be subject to the pension contribution requirements. The fact that the money received is claimed to be income exempt from contribution is not always enough. The courts are not bound by terminology used by the parties and will look to the actual legal character of the compensation.<sup>304</sup>

As a general test, the Illinois courts have defined "salary" as a fixed, annual, periodic amount, payable for services depending upon the time of employment and the services rendered.<sup>305</sup> A bonus, on the other hand, has been defined as a gratuity to which the recipient has no right to make a demand; an addition to salary or wages normally paid for extraordinary work.<sup>306</sup> Thus, compensation designated as

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<sup>302</sup> 40 ILCS 5/3-125.1.

<sup>303</sup> *Id.*

<sup>304</sup> Park Ridge Firemen's Pension Fund vs. Department of Insurance, 109 Ill.App.3d 919, 441 N.E.2d 107 (1982).

<sup>305</sup> Board of Education vs. Chicago Teachers Union, 89 Ill.App.3d 861, 412 N.E.2d 587 (1980); In re Sanitary District Attorneys, 351 Ill. 206, 184 N.E.2d 332 (1932).

<sup>306</sup> Park Ridge Firemen's Pension Fund, *supra*, 441 N.E.2d at 109.

“merit increases” was in one case considered permanent and vested and thus a part of regular salary subject to pension deductions.<sup>307</sup> Similarly, an amount regularly paid as a bonus, was deemed to be a part of salary subject to pension deductions.<sup>308</sup>

The Department of Insurance has also promulgated rules defining the term salary. Under the Department rules (50 Illinois Administrative Code Section 4402, et seq.), the following types of pay are considered salary:

- (a) base pay;
- (b) education pay;
- (c) holiday pay, if paid regardless of whether the employee must work;
- (d) longevity pay;
- (e) overtime pay;
- (f) specialty rank pay;
- (g) temporary pay.

Under the Department rules, the following categories of pay are not considered salary:

- (a) accumulated unused time;
- (b) awards;
- (c) automobile allowance;
- (d) food allowance;
- (e) housing allowance;
- (f) merit pay;
- (g) overtime pay;

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<sup>307</sup> Oak Brook Police Pension Fund vs. Department of Insurance, 42 Ill.App.3d 155, 356 N.E.2d 171 (1976).

<sup>308</sup> Park Ridge Firemen's Pension Fund, supra, 441 N.E.2d at 110.

- (h) shift differential;
- (i) temporary pay;
- (j) uniform allowance.

### **1. §7.9 PICK UP OF CONTRIBUTIONS**

The contributions paid by police officers towards their pensions are considered income and subject to income taxation. However the Pension Code, in conjunction with the Internal Revenue Code, provides a procedure where such individual contributions will not be subject to income tax.

The Pension Code provides that the mandatory contributions paid by police officers from their salaries may be paid by the municipality.<sup>309</sup> If the municipality decides to “pick up” and pay these contributions, they are treated as employer contributions under the Internal Revenue Code.<sup>310</sup> If the contributions are picked up by the municipality they are counted as the police officer’s contributions. The municipality may pick up or pay these contributions by reducing the cash salary of the police officer or by offsetting against future salary increases.<sup>311</sup> However, this is a matter that is subject to negotiation.

### **F. §7.10 GIFTS AND DONATIONS**

Another method whereby the pensions of police officers can be funded is by gifts and donations. The pension fund is authorized to accept donations in the form of money, real estate, or personal property.<sup>312</sup> In reality, such gifts are few and far between.

### **G. §7.11 INVESTMENT INCOME AND INTEREST ON DEPOSITS**

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<sup>309</sup> 40 ILCS 5/3-125.2.

<sup>310</sup> 26 U.S.C. §414.

<sup>311</sup> 40 ILCS 5/3-125.2.

<sup>312</sup> 40 ILCS 5/3-140.1.

The fourth source of funding for a police pension fund stems from earnings on pension fund investment and interest earned on deposits. Pension fund deposits in banks or savings and loan associations and all interest on such deposits are considered a part of the pension fund.<sup>313</sup> A municipality can also be liable for interest when there is a failure to pay required pension contributions in a timely manner.<sup>314</sup>

#### **H. §7.12 FUNDING RESERVES**

Article 3 of the Code requires each pension fund to establish and maintain a reserve equal to the total actuarial requirements of the fund.<sup>315</sup> The reserve is thus established to insure the payment of future benefits and all other obligations under the Code. These obligations are also determined by actuarial assumptions and calculations.

#### **I. §7.13 UNDERFUNDING**

As indicated earlier on in this Chapter, one of the causes for any “pension crisis” in Article 3 police pension funds is the failure of some municipalities to make the necessary annual contributions to the pension fund. In recent years there have been a number of underfunding cases brought in Illinois by public pension board trustees, participants and beneficiaries.<sup>316</sup> These cases have only been met with partial success. No doubt, as municipalities try to find new ways to cut taxes and as Illinois public

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<sup>313</sup> 40 ILCS 5/3-135.

<sup>314</sup> Ryan vs. City of Chicago, 148 Ill.App.3d 638, 499 N.E.2d 517, 101 Ill.Dec. 929 (1986).

<sup>315</sup> 40 ILCS 5/3-127.

<sup>316</sup> See e.g., People ex rel Sklodowski vs. State of Illinois, 182 Ill.2d 220, 695 N.E.2d 374, 230 Ill.Dec. 884 (1998); McNamee vs. State of Illinois, 173 Ill.2d 433, 672 N.E.2d 1159, 220 Ill.Dec. 147 (1996); Evanston Police Pension Fund vs. City of Evanston, 281 Ill.App.3d 1047, 667 N.E.2d 657, 217 Ill.Dec. 568 (1996).

pension boards become more sophisticated in monitoring proper funding, the litigation in this area of pension law is bound to increase.

The life-blood of any pension system is the contributions and monies that are paid into the fund. If proper and adequate contributions are not made it is probable that someone at some future point in time will receive a pension that he or she is entitled to. This underfunding can occur in a number of different ways. The municipality may simply fail or refuse to contribute the proper amount to the pension fund.<sup>317</sup> The state legislature may change the funding provisions under the law to allow for lower annual contributions.<sup>318</sup> Finally, the governmental employer may attempt to divert pension funds for other uses.<sup>319</sup> Public pension funds unfortunately are often viewed by some governmental official as huge “cash cows” that are theirs for the taking. However, under the Pension Code,<sup>320</sup> taxes that are levied by the municipality on behalf of the police or firefighter pension fund must be used for funding of the police and fire pension funds and not for the general corporate purposes of the municipalities.

Litigation regarding funding of police and firefighter pension funds has taken place for many years in Illinois. In 1918, the Illinois Supreme Court held that the State legislature could constitutionally require municipalities to establish, maintain and fund the public pension system.<sup>321</sup> Thirty years later the supreme court held that a municipality must levy for pension contribution purposes an amount necessary to meet the pension funds annual requirements, but only that amount.<sup>322</sup> That same year it was held that a pension board has no discretion to alter the funding formula

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<sup>317</sup> Evanston Police Pension Fund vs. City of Evanston, *supra*.

<sup>318</sup> McNamee vs. State of Illinois, *supra*.

<sup>319</sup> People ex rel Sklodowski vs. State of Illinois, *supra*.

<sup>320</sup> 40 ILCS 5/22-403.

<sup>321</sup> Police Pension Fund of Lincoln Park vs. Commissioners of Lincoln Park, 282 Ill. 348 (1918).

<sup>322</sup> Sommers vs. Patton, 399 Ill. 540, 78 N.E.2d 313 (1948).

established by the legislature.<sup>323</sup> It has also been held that the taxes levied by the municipality for pension funding cannot be used for any other purpose by the municipality.<sup>324</sup>

In another important funding decision it was held that a police pension board stated a cause of action where it alleged that the municipality did not comply with the funding requires of Article 3 of the Pension Code and where a declaratory judgment was sought that the municipality must pass an ordinance for a tax levy that would meet the requirements of the Pension Code's funding provisions.<sup>325</sup>

#### **J. §7.14 STATUTORY UNDERFUNDING PROTECTIONS**

The 2010 Pension Code amendments now contain certain underfunding protections for Article 3 police pension funds.<sup>326</sup> The problem is that these protections do not take effect until the fiscal year 2016. In fiscal year 2016, if a municipality fails to transmit fund contributions for more than ninety (90) days after the payment is due, the pension fund, after giving notice to the municipality, can certify to the State Comptroller the amounts of the delinquent payments and the Comptroller must deduct and deposit into the fund one-third of any grants of State funds to the municipality.<sup>327</sup>

In fiscal year 2017, the amount increases to two-thirds of the total amount of any grants of funds.<sup>328</sup> In fiscal year 2018 and each year thereafter, the pension fund can receive the total amount of any State grants.<sup>329</sup> The above process is not the perfect solution to the problem of municipal underfunding. However, it is at least a start.

#### **I. §7.15 FIDUCIARY DUTIES CONCERNING UNDERFUNDING**

<sup>323</sup> McFarlane vs. Holtz, 401 Ill. 506, 82 N.E.2d 650 (1948).

<sup>324</sup> Patterson vs. City of Granite City, 78 Ill.App.3d 821, 397 N.E.2d 237 (1979).

<sup>325</sup> Evanston Police Pension Fund vs. City of Evanston, 281 Ill.App.3d 1042, 667 N.E.2d 657, 217 Ill.Dec. 568 (1996).

<sup>326</sup> 40 ILCS 5/3-125(c).

<sup>327</sup> 40 ILCS 5/3-125(c)(1).

<sup>328</sup> 40 ILCS 5/3-125(c)(2).

<sup>329</sup> 40 ILCS 5/3-125(c)(3).

It should be apparent that a police or firefighter trustee faced with an underfunding problem has a duty to take appropriate action to rectify the situation. To date, there are no Illinois cases on point. However, under ERISA, numerous cases have held that a pension trustee breaches his or her fiduciary duties by failing to collect pension contributions and remedy any underfunding problems.<sup>330</sup> At a minimum, courts have held under ERISA that fiduciary obligations require that the trustee notify participants and beneficiaries of any underfunding.<sup>331</sup> If there is a possibility of underfunding, pension trustees have a fiduciary duty to investigate whether or not the pension fund is receiving appropriate contributions.<sup>332</sup>

The Department of Insurance has indicated that a substantial number of downstate police and firefighter pension funds are underfunded. If these trustees fail to take appropriate remedial action they could be liable under the law for breaching their fiduciary duties.

#### **K.     §7.16        INSUFFICIENT FUNDS**

If at any time there are not sufficient funds to pay participants and beneficiaries, the municipality is to make every legal effort to replenish the fund so that recipients will receive their benefits. If the efforts made to replenish the funds are unsuccessful benefits are to be paid on a pro rata basis from the available funds.<sup>333</sup> Let's hope police pension funds do not have to rely on this provision.

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<sup>330</sup> Schaefer vs. Arkansas Medical Society, 853 F.2d 1487 (8th Cir. 1988); Chambers vs. Kaleidoscope, Inc., 650 F.Supp. 359 (N.D. Ga 1986); Bidwell vs. Garvey, 743 F.Supp. 393 (D.C. Md. 1990).

<sup>331</sup> Rosen vs. Hotel & Restaurant Employees Union, 637 F.2d 592 (3rd Dist. 1981).

<sup>332</sup> Morse vs. Adams, 857 F.2d 339 (6th Cir. 1988).

<sup>333</sup> 40 ILCS 5/3-142.

## **CHAPTER 8**

### **INVESTMENT OF PENSION FUNDS**

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**CHAPTER 8**  
**INVESTMENT OF PENSION FUNDS**

**A. §8.1 INTRODUCTION**

An important function of every pension fund trustee is the duty and responsibility of investing pension fund assets. A pension fund depends upon a reasonable rate of return on its investments in order to ensure both fund stability as well as fund growth. If an investment decision is not made with the utmost care, the pension fund can suffer losses. If the investment is not within the pension board's

statutory permitted investments, the pension board may be subjected to proceedings before the Illinois Department of Insurance, or the board itself. The individual trustees could also be subjected to civil suit.<sup>334</sup>

A police pension fund trustee's statutory investment authority is found in Sections 1-113.1, 1-113.4, and 3-135 of the Pension Code.<sup>335</sup> If the pension trustees are not careful in their investment strategies, the pension fund could lose not only income, but pension fund assets as well. It should be remembered that this handbook only deals with the legal standards involving investments. It does not deal with investment strategy or investment advice.

As stated earlier, pension board trustees are considered by law to be fiduciaries.<sup>336</sup> The law concerning the scope and extent of a pension trustee's investment duties and functions under the Illinois Pension Code emanates from many sources. Among such sources are the following:

1. The statutory duties of trustees under the Code;<sup>337</sup>
2. The Illinois common law concerning the duties of trustees;
3. Certain prohibited transactions set out in the Code;<sup>338</sup>
4. The statutory list of investments permitted by law;<sup>339</sup>
5. The provisions of the Employee Retirement Income Security Act of 1974 (ERISA),<sup>340</sup> and the court cases construing the provisions of ERISA.

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<sup>334</sup> 40 ILCS 5/4-114, 5/4-115. Such litigation may be brought by the Attorney General on behalf of the Department of Insurance or any participant or beneficiary.

<sup>335</sup> 40 ILCS 5/1-113.1, 5/1-113.4, 40 ILCS 5/4-123 and 40 ILCS 5/4-128.

<sup>336</sup> The term fiduciary is defined in 40 ILCS 5/1-101.2 and is discussed in Chapter 2 of this book.

<sup>337</sup> The fiduciary duties of trustees are set forth in §1-109 of the Code and are discussed in greater detail in Chapter 6.

<sup>338</sup> Prohibited transactions are listed in §1-110(a) and (b) of the Code, 40 ILCS 5/1-110(a).

<sup>339</sup> The investment authority of Article 3 and 4 pension board trustees is now set forth in Sections 1-113.1 through 1-113.10, 40 ILCS 5/1-113.1 – 5/1-113.10 of the Pension Code.

**B. §8.2 PERMISSIBLE INVESTMENTS**

The Code specifically sets forth the types of investments permitted by a pension fund. This investment authority was initially set forth in §3-135 of the Code,<sup>341</sup> which now provides that as of January 1, 1998, a police officer's pension board established under Article 3 of the Pension Code must invest in accordance with Sections 1-113.1 through 1-113.10 of the Code.<sup>342</sup> The following investments are now permitted under Article 3 as of that date:

- (1) Interest bearing direct obligations of the United States.
- (2) Interest bearing obligations fully guaranteed or insured by the United States.
- (3) Interest bearing bonds, notes, debentures or other similar obligations of agencies of the United States.
- (4) Interest bearing savings accounts or certificates of deposit, issued by federally chartered banks or savings and loans that are insured by agencies of the federal government.
- (5) Interest bearing savings accounts or certificates of deposit issued by the State of Illinois that are insured by agencies of the federal government.
- (6) Investments in credit unions that are insured by agencies of the federal government.
- (7) Interest bearing bonds of the State of Illinois.
- (8) Pooled interest bearing accounts managed by the Illinois Public Treasurer's Investment Pool, interest bearing funds or pooled accounts of the Illinois

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<sup>340</sup> 29 U.S.C. §1001, *et seq.*

<sup>341</sup> 40 ILCS 5/3-135.

<sup>342</sup> 40 ILCS 5/1-113.1 through 5/1-113.10.

Municipal Investment Funds, and interest bearing funds managed by banks in accordance with the law of the State of Illinois.

- (9) Interest bearing bonds or tax anticipation warrants of any county, township or municipal corporation of the State of Illinois.
- (10) Direct obligations of the State of Israel subject to certain limitations.
- (11) Money market mutual funds of investment companies registered under the federal Investment Company Act of 1940, subject to certain portfolio limitations.
- (12) General accounts of life insurance companies authorized to do business in Illinois.
- (13) Separate accounts managed by life insurance companies authorized to do business in Illinois, comprised of diversified portfolio of common or preferred stocks, bonds, money market instruments, real estate or loans upon real estate comprised of first or second mortgages. This investment vehicle may not exceed 10% of the pension fund's net assets.<sup>343</sup>
- (14) Corporate bonds managed through an investment advisor rated as investment grade by one of the largest two investment rating services at the time of purchase.<sup>344</sup> If downgraded below investment grade, the bonds must be liquidated within 90 days of being liquidated.

#### **1. §8.3 ADDITIONAL PERMISSIBLE INVESTMENTS OF FUNDS WITH ASSETS OF \$2,500,000**

In addition to the investments permitted above, police pension funds with net assets of \$2,500,000 or more may also invest in the following:

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<sup>343</sup> 40 ILCS 5/1-113.2. Net assets are defined to include both the case and invested assets of a pension fund. 40 ILCS 5/1-113.1

<sup>344</sup> 40 ILCS 5/1-113.2

- (1) Separate Accounts managed by a life insurance company authorized to do business in Illinois comprised of diversified portfolios of common or preferred stocks, bonds or money market instruments.
- (2) Mutual funds meeting the following requirements:
  - (a) The fund is managed by an investment company as defined and registered under the federal investment company act.
  - (b) The mutual fund has been in operation five years.
  - (c) The mutual fund has total net assets of 250 million dollars or more.
  - (d) The mutual fund is comprised of stocks, bonds or money market instruments.

A pension fund's total investment in these items cannot exceed 35% of the market value of the pension fund's net present assets as stated in the most recent annual report on file with the Division of Insurance.<sup>345</sup>

## **2. §8.4 ADDITIONAL PERMISSIBLE INVESTMENTS OF FUNDS WITH ASSETS OF \$5,000,000**

In addition to the investments permitted above, police pension funds with net assets of \$5,000,000 or more may also invest in the following, provided that the pension fund has appointed an investment advisor:

- (1) Common stocks authorized for investments of trust funds under the laws of the State of Illinois provided that the stocks meet the following requirements.
  - (a) The stocks are listed on a national securities exchange or board of trade or quoted in NASDAQ NMS.

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<sup>345</sup> 40 ILCS 5/1-113.3.

- (b) The securities are of a corporation existing under the laws of the United States or any state, district or territory thereof and the corporation has been in existence at least five years.
- (c) The corporation has not been in arrears on payment of dividends during the preceding five years.
- (d) The market value of any corporation does not exceed 5% of the cash and invested assets of the pension fund and such investment does not exceed 5% of the total outstanding stock of that corporation.
- (e) The stocks are issued or guaranteed by a corporation whose common stock qualified for investment by the pension board.
- (f) The issue has been subject to the federal Securities Exchange Act of 1934 and has been current with the filing requirements during the last three years.<sup>346</sup>

A pension fund's total investment of assets under this Section and Section 113.3 cannot exceed 35% of the market value of the fund's net pension assets.<sup>347</sup>

### **3. §8.5 ADDITIONAL PERMISSIBLE INVESTMENTS OF FUNDS WITH ASSETS OF \$10,000,000**

Police Pension funds with net assets of \$10,000,000 or more may invest an additional portion of its assets in common and preferred stocks and mutual funds, provided the fund has retained an investment advisor.<sup>348</sup> The following terms and conditions apply to such investments. The fund's total

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<sup>346</sup> 40 ILCS 5/1-113.4 (a).

<sup>347</sup> 40 ILCS 5/3-113.4(b).

<sup>348</sup> 40 ILCS 5/1-113.4a(a).

investment cannot exceed 50% of the present net assets and effective July 1, 2012, 55% of the net assets.<sup>349</sup>

As to stocks, they must be listed on a national securities exchange and the securities must be of a corporation in existence for at least five (5) years. In addition, the market value of a stock in any one corporation cannot exceed 5% of the cash and invested assets of the pension fund.<sup>350</sup>

As to mutual funds, the fund must be managed by a registered investment company and the mutual fund must be in existence for at least five (5) years with net assets of \$250,000,000 or more.<sup>351</sup> In addition, the mutual fund must be comprised of a diversified portfolio of common or preferred stocks, bonds or money market instruments.

#### **C. §8.6        CUSTODIAL REQUIREMENTS**

All investments must be held and accounted for to indicate ownership by the pension board.<sup>352</sup> The treasurer of the municipality or a bank or trust company may now be a custodian.<sup>353</sup> Each custodian is required to keep such assets and accounts in the manner prescribed by the pension board. The Illinois Attorney General has issued an opinion indicating that the requirement that pension funds be invested in the name of the pension board, does not necessarily require that each individual investment be held or registered in the name of the pension board. Thus, according to the Illinois Attorney General, securities may be registered in the name of a nominee.<sup>354</sup>

#### **D. §8.7        STATUTORY INVESTMENT DUTIES**

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<sup>349</sup> 40 ILCS 5/1-1113.4a(d).

<sup>350</sup> 40 ILCS 5/1-1113.4a(b).

<sup>351</sup> 40 ILCS 5/1-1113.4a(c).

<sup>352</sup> 40 ILCS 5/1-113.7.

<sup>353</sup> *Id.*

<sup>354</sup> Illinois Attorney General Opinion No. 92-027, (June 1992).

In addition to specifying what types of investments are permitted, the Pension Code also imposes a number of general investment duties and standards upon pension board trustees who are by law fiduciaries. These standards of care can be characterized as follows:

- (1) The Executive Purpose Rule.<sup>355</sup>
- (2) The Diversification Rule.<sup>356</sup>
- (3) The Prudent Person Rule.<sup>357</sup>

These basic standards of care form the foundation of a pension trustee's duties to the fund and these standards apply to all facets of a trustee's conduct, including investing. In addition to duties stated above, a pension trustee must always act in accordance with all of the other provisions of Article 3, dealing with police pensions.<sup>358</sup> These duties are repeated in the recent investment amendments.<sup>359</sup>

These rules are very general in nature and sometimes it is difficult to determine whether or not a certain course of conduct is in conformance with a trustee's statutory duties. The above rules are discussed with reference to the trustee's investment powers in the sections that follow.

### **1. §8.8 THE EXCLUSIVE PURPOSE RULE**

Section 1-109 of the Pension Code requires a trustee to carry out his or her investment duties with respect to the pension fund solely in the interest of the participants and beneficiaries and:

- (a) For the exclusive purpose of:
  - (1) Providing benefits to participants and their beneficiaries; and

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<sup>355</sup> 40 ILCS 5/1-109(a)(1).

<sup>356</sup> 40 ILCS 5/1-109(c).

<sup>357</sup> 40 ILCS 5/1-109(b).

<sup>358</sup> 40 ILCS 5/1-109(d).

<sup>359</sup> 40 ILCS 5/1-113.1.

(2) Defraying reasonable expenses of administering the pension fund.<sup>360</sup>

Pension investments, as well as all other official duties of a trustee, must be carried out with the exclusive purpose rule in mind. The Pension Code's exclusive purpose rule is a codification of Illinois common law trust principles according to one court.<sup>361</sup> The exclusive purpose rule has been described as the duty to act with complete and undivided loyalty to the beneficiaries and participants of the pension fund.<sup>362</sup> In the context of investments, the trustees should always ask themselves: Is this investment in the exclusive interest of the pension fund's participants and beneficiaries? The exclusive purpose rule also prohibits a trustee from investing trust funds for his or her own individual benefit.<sup>363</sup> Under the exclusive purpose rule, fiduciaries must act with an eye single to the interests of the participants and beneficiaries and may not place themselves in a position in which they are required to compromise duty of undivided loyalty to plan participants.<sup>364</sup>

One court has held that a mortgage loan investment program that was not available to all pension fund participants did not violate the exclusive purpose rule, where the program was made available to all pension board participants on a reasonably equivalent basis.<sup>365</sup>

## 2. **§8.9 THE DIVERSIFICATION RULE**

Section 1-109 (c) of the Code also requires a trustee to act:

By diversifying the investments of the retirement system so as to minimize the risk of large losses, unless it is clearly prudent not to do so.

<sup>360</sup> 40 ILCS 5/1-109(a)(1), 5/1-109(a)(2).

<sup>361</sup> Barrington Police Pension Board vs. Department of Insurance, 211 Ill.App.3d 698, 570 N.E.2d 622, 156 Ill. Dec. 146 (1991).

<sup>362</sup> Rennacker vs Rennacker, 156 Ill.App.3d 712, 509 N.E.2d 798, 109 Ill.Dec. 137 (1987); Freund vs Marshall & Ilsley, 485 F.Supp.629 (W.D. Wis. 1979).

<sup>363</sup> Barrington Police Pension Board vs. Department of Insurance, *supra*; Central Standard Insurance Co. vs. Gardner, 17 Ill.2d 220, 161 N.E.2d 278 (1959).

<sup>364</sup> Donovan vs. Bierwirth, 680 F.2d 263 (2<sup>nd</sup> Cir. 1982).

<sup>365</sup> Barrington Police Pension Board vs. Department of Insurance, *supra*.

The Pension Code specifically requires diversification as to certain investments by placing limitations on how much of a pension fund's portfolio can be invested in various investment vehicles.<sup>366</sup>

As indicated above, diversification is required unless it would be "clearly prudent not to do so." This means that if investment diversification does not occur, the burden is on the pension board failing to diversify or to justify why it did not do so. One recent federal court case under ERISA held that pension trustees violated the diversification requirement when over 65% of the pension fund's assets were invested in commercial real estate first mortgages.<sup>367</sup> An investment of 18.5% and 14% of the pension fund's assets in a single investment did not violate the diversification rules under ERISA.<sup>368</sup>

### **3. §8.10 THE PRUDENT PERSON RULE**

Under the law, a pension trustee must also discharge his or her duties with respect to the pension fund in the following manner:

With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims.<sup>369</sup>

The above provision comes from both the common law of trusts and an almost identical provision in ERISA.<sup>370</sup> The Illinois courts will refer to state trust law and ERISA when deciding cases involving the prudent person rule under the Illinois Pension Code.<sup>371</sup>

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<sup>366</sup> 40 ILCS 5/1-113.2 – 5/1-113.4.

<sup>367</sup> Brock vs. Citizens Bank of Clovis, 841 F.2d 344 (10<sup>th</sup> Cir. 1988).

<sup>368</sup> Sandoval vs. Simmons, 622 F.Supp.1174 (D.C. Ill.1985).

<sup>369</sup> Section 1-109(b), 40 ILCS 5/1-109(b).

<sup>370</sup> 29 U.S.C. §1104(a)(1)(B).

<sup>371</sup> Barrington Police Pension Board vs. Division of Insurance, 211 Ill.App.3d 698, 570 N.E.2d 622 156 Ill.Dec. 146, (1991).

The courts have defined prudence as a procedural test which requires the fiduciaries to conduct an “intensive and scrupulous” investigation into the investment. The courts will not focus on the success or failure of the investment to determine if it was prudent; instead the courts will examine the methods employed by the fiduciaries in investigating the investment.<sup>372</sup>

As indicated above, the prudent person rule contemplates a duty on the part of a pension trustee to make an independent inquiry into the merits of a particular investment decision. A trustee’s lack of familiarity with a mode of investment is no excuse for making an imprudent investment. If a trustee is lacking the ability to evaluate the soundness of a proposed investment, he or she should seek outside assistance.<sup>373</sup> Under an objective standard of prudence, trustees are judged according to the standards of others acting in a like capacity and familiar with such matters.<sup>374</sup> This has been characterized by some as the “Prudent Investor Rule.”<sup>375</sup>

#### a. §8.11 ERISA GUIDELINES

As indicated above, the language of 40 ILCS 5/1-109(b) establishing the prudent person standard under the Pension Code is almost identical with the language contained in ERISA. Thus, guidelines for making prudent investments under ERISA would be helpful in determining whether an investment is prudent under the Illinois Pension Code. Under ERISA standards, the mere fact that there may be a diminution in income in the fund’s investments during a given year does not by itself

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<sup>372</sup> Brock vs. Walton, 794 F.2d 586 (11<sup>th</sup> Cir. 1986).

<sup>373</sup> Katsaros vs. Cody, 744 F.2d 270, (2<sup>nd</sup> Cir. 1984).

<sup>374</sup> Marshall vs. Glass & Metal Association, 507 F.Supp. 378 (D.C. Hawaii 1980).

<sup>375</sup> See, Leibig, Social Investments and the Law, pg. 21 (1980).

establish an imprudent investment. The standard to be applied is that of conduct tested at the time of the investment decision, not that of performance judged from the vantage point of hindsight.<sup>376</sup>

The prudent person standard is flexible. As such, the adequacy of the trustee's investigation into each investment decision is to be evaluated in light of the character and aims of the particular type of plan that the trustee serves.<sup>377</sup> ERISA requires under the prudence rule that the trustee vigorously and independently investigate the wisdom of the contemplated investment. The prudent person standard only requires that the trustees receive a reasonable rate of interest, not the prevailing or market rate of interest.<sup>378</sup>

Under ERISA regulations, prudent investment conduct takes into consideration the following factors:

- (1) the composition of the portfolio with regard to diversification;
- (2) the liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
- (3) the projected return of the portfolio relative to the funding objectives of the plan.<sup>379</sup>

The regulations as to prudent investments under ERISA<sup>380</sup> contain valuable guidelines for Illinois pension trustees in determining the standards for making prudent investments. Trustees concerned about their investment duties would do well to consult these regulations.

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<sup>376</sup> American Communications Assoc. vs. Retirement Plan for Employees of RCA, 488 F.Supp.479 (S.D. N.Y. 1980). aff'd. 646 F.2d 559 (2<sup>nd</sup> Cir. 1980). Donovan vs. Cunningham, 716 F.2d 1455 (5<sup>th</sup> Cir. 1983); Donovan vs. Walton, 609 F.Supp. 1221 (S.D. Fla. 1985).

<sup>377</sup> Donovan vs. Walton, 609 F.Supp. 1221 (S. D. Fla. 1985).

<sup>378</sup> Brock vs. Walton, 794 F.2d 586 (11<sup>th</sup> Cir. 1986).

<sup>379</sup> 29 CFR §2550.404a-1(b)(2).

<sup>380</sup> 29 CFR §2550, et seq.

**E. §8.12 INVESTMENT POLICIES**

Each Illinois public pension fund must establish a written investment policy, either separately or as part of the pension board's rules and regulations.<sup>381</sup> The purpose of an investment policy is to establish written guidelines and objectives for those persons responsible for investing the assets of the pension fund. Once investment guidelines have been established, they should be periodically reviewed by all of the pension board trustees as well as all other individuals who have any input or responsibility as to the pension fund's investment decisions. The board's investment policy must also be filed with the Department of Insurance.<sup>382</sup>

**F. §8.13 INVESTMENT MANAGERS AND ADVISORS**

The areas of prudent pension investments and legally permitted investments are quite complicated. Pension board trustees should seek the professional assistance of competent investment advisors or investment managers when making pension fund investment decisions. The Pension Code now specifically requires Article 3 and 4 pension boards to retain an investment adviser before certain types of investments can be made.<sup>383</sup> The Code also provides that any pension board may appoint an investment adviser.<sup>384</sup> An investment advisor is defined in the Pension Code and is by law a fiduciary.<sup>385</sup>

All advise and services rendered by an investment adviser must be pursuant to a written agreement between the board and the adviser and must conform to the pension board's investment

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<sup>381</sup> 40 ILCS 5/1-113.6.

<sup>382</sup> *Id.*

<sup>383</sup> 40 ILCS 5/1-113.5(a). This requirement pertains to pension boards having net assets in excess of \$5,000,000 who seek to invest under §1-113.4 of the Pension Code.

<sup>384</sup> 40 ILCS 5/1-113.5(a).

<sup>385</sup> 40 ILCS 5/1-101.4.

policy.<sup>386</sup> This contract must also conform with certain provisions in the Pension Code.<sup>387</sup> The contract entered into between the pension board and the investment adviser must be submitted to the Department of Insurance within 30 days from the date of execution.<sup>388</sup>

The selection of an investment adviser must be done carefully or the trustees can be liable for the consequences. In selecting an investment advisor the following criteria should be considered:

- (a) the cost or fees charged;
- (b) familiarity with Illinois public pension funds;
- (c) prior investment performance;
- (d) cancellation provisions; and
- (e) terms of the investment adviser's contract.

Investment advisers often talk in terms that pension trustees are not familiar with. Investment advisers should be instructed to speak and write in terms that each pension trustee can understand. If a trustee does not understand what the investment adviser is saying, the trustee should require the individual to speak English instead of "investmentese."

#### **1. §8.14 PROCEDURES FOR SELECTING INVESTMENT ADVISERS**

As previously stated, it is recommended that a pension board under Article 3 retain one or more investment advisers. There are a number of reasons for this recommendation. First, few pension trustees have the expertise necessary to make certain investment decisions. Second, monitoring the investment portfolio of a pension fund is time consuming. Third, the stakes are high if errors are made.

When selecting an investment adviser the following guidelines should be followed:

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<sup>386</sup> 40 ILCS 5/113.5(b).

<sup>387</sup> *Id.*

<sup>388</sup> 40 ILCS 5/1-113.5(c).

- (a) For each investment adviser position to be filled, proposed investment guidelines shall be established and/or an investment style shall be identified, for that portion of the fund's assets to be committed to such investment adviser's discretion.
- (b) The pension board should interview a number of investment adviser candidates before making a selection. The interviews should include a range of candidates whose expertise is consistent with the proposed investment guidelines established and/or investment style identified for the position. The process by which such candidates are identified shall be documented.
- (c) Information necessary for the prudent selection of an investment adviser shall be obtained from each of the candidates. That information shall include, but not necessarily be limited to the types of information described below and, insofar as appropriate, supporting documentation:
  - (1) whether the candidate qualifies as an investment adviser or manager pursuant to section 3 (38) of ERISA;
  - (2) the business structure and affiliations of the candidate;
  - (3) financial condition and capitalization of the candidate;
  - (4) a description of the investment style proposed by the candidate;
  - (5) a description of the investment process to be followed by the candidate;
  - (6) the identity, experience and qualification of the professionals who will be involved in handling the fund's account;
  - (7) whether any relevant litigation or enforcement actions have been initiated within a reasonable relevant period of time against the candidate, the candidate's officers or

directors, or the candidate's investment professionals who will have responsibility for the plan's account;

- (8) a description of the experience and performance record over an appropriate period of time of the candidate and its investment professionals, including experience managing other tax-exempt and employee benefit plan assets;
  - (9) whether the candidate has and would propose to utilize the services of an affiliated broker/dealer and, if so, the types of transactions for which such affiliates would be used and the financial arrangement with the broker/dealer;
  - (10) the procedures to be employed by the candidate to comply with the Pension Code's prohibited transaction restrictions, including whether the Candidate is a qualified professional asset manager;
  - (11) whether the candidate has the bonding required by ERISA, or the Pension Code;
  - (12) whether the candidate has fiduciary liability or other insurance that would protect the interests of the Plan in the event of a breach of fiduciary duty;
  - (13) the proposed fee structure;
  - (14) the identity of client references;
  - (15) the total amount of assets under the control of the candidate;
- (d) References given by the candidate should be contacted; other pension boards using the investment manager should be contacted.

**2. §8.15 PROCEDURES FOR MONITORING  
INVESTMENT ADVISERS**

Once the investment adviser is chosen, the pension trustees' investment obligations are not complete. The pension board has a duty to monitor the performance of the investment adviser. The investment monitoring process should include the following:

- (a) Review, at least quarterly, the portfolio of each Investment Adviser for compliance with its investment guidelines.
- (b) Review, at least quarterly, each investment adviser's quarterly report, and generally compare that report in material respects with information provided by the fund's custodial trustee, including the custodial trustees' statement of transactions.
- (c) Review, at least quarterly, the basis on which assets under each investment adviser's control are valued.
- (d) Compute, on a quarterly basis, the rate of return for each investment adviser on an overall basis, and by asset class and, where investments are in more than one sector, by sector.
- (e) Compare, at least quarterly, the investment results of each investment adviser with appropriate indices or benchmarks.
- (f) Review, at least annually, each investment adviser's practices regarding brokerage and trading.
- (g) Verify, at least quarterly, each investment adviser's fee computation.
- (h) Review, at least annually, the fund's cash management and short-term investment procedures and performances as well as the overall performance of, and continued retention, of the fund's investment adviser.

**G. §8.16      ILLEGAL INVESTMENTS**

An individual operating as a dealer, salesperson or investment adviser who sells a pension fund an unauthorized security or investment is subject to penalties under the Illinois Securities Law.<sup>389</sup> It is important to know what investments are legally permitted.

The investment limitations set forth in Article 1 are applicable only at the time of the investment and do not require liquidation at any time.<sup>390</sup>

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<sup>389</sup> 40 ILCS 5/1-113.9.

<sup>390</sup> 40 ILCS 5/1-113.10.

## **CHAPTER 9**

### **ADJUDICATION OF PENSION CLAIMS**

- A. §9.1 INTRODUCTION
- B. §9.2 GENERAL PENSION CLAIMS PROCEDURES
- C. §9.3 ARTICLE 3 BENEFITS
- D. §9.4 DETERMINING ELIGIBILITY FOR DISABILITY BENEFITS
  - 1. §9.5 DUTY RELATED DISABILITY PENSION
  - 2. §9.6 NOT ON DUTY DISABILITY PENSION
- E. §9.7 DETERMINING THE APPROPRIATE DISABILITY BENEFIT
  - 1. §9.8 DETERMINING WHETHER THERE IS A DISABILITY
  - 2. §9.9 DETERMINING CAUSATION
    - a. §9.10 THE SPECIAL RISK REQUIREMENT
  - 3. §9.11 LINE OF DUTY DISABILITY GRANTED – SPECIAL RISK FOUND
  - 4. §9.12 LINE OF DUTY DISABILITY DENIED – NO SPECIAL RISK FOUND
  - 5. §9.13 PRE-EXISTING CONDITIONS
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- F. §9.15 DETERMINING SUSPENSION FROM DUTY
- G. §9.16 PSYCHOLOGICAL OR MENTAL DISABILITY
  - 1. §9.17 ANALYZING PSYCHOLOGICAL DISABILITY CASES
- H. §9.18 DETERMINING BENEFIT AMOUNT IN DISABILITY CASES

- I. §9.19 TIME FRAME FOR ADJUDICATING PENSION CLAIMS
- J. §9.20 RE-EXAMINATION AND RETURN TO DUTY
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- N. §9.30 ORDER AND PROOF IN PENSION HEARINGS
  - 1. §9.31 MAKING AN ADEQUATE RECORD
- O. §9.32 BOARD DECISIONS
  - 1. §9.33 CERTIFICATE OF DISABILITY
- P. §9.34 MODIFICATION OF DECISIONS

## CHAPTER 9

### **ADJUDICATING POLICE PENSION CLAIMS**

#### A. **§9.1 INTRODUCTION**

One of the most important functions of a police pension board is the determination of who is entitled to benefits under Article 3. Such decisions should not be made lightly. On the one hand, the grant of benefits to someone who is not entitled to a pension can cost the pension fund thousands of

dollars. On the other hand, the wrongful denial of pension benefits in any given case can have a severe financial impact upon the police officer or the family members entitled to such benefits.

Article 3 of the Pension Code provides for three distinct types of pensions. These are:

- (1) retirement pension benefits;
- (2) disability pension benefits; and
- (3) survivors' benefits.

Such benefits are received by the police officer or by the spouse, children or dependent parent.<sup>391</sup>

The various types of benefits under Article 3 are generally discussed in Chapter 3. The adjudication procedures relating to these pension claims are discussed in the following sections of this Chapter. The greatest amount of litigation for pension boards under Article 3 arises out of the adjudication of pension claims.

#### **B. §9.2 GENERAL PENSION CLAIMS PROCEDURES**

An individual police officer is not automatically entitled to pension benefits under Article 3 of the Pension Code. He or she must first be statutorily eligible for such benefits.<sup>392</sup> The participant or beneficiary must also make application for such benefits. The burden of proving the entitlement to a pension or disability benefit is on the applicant.<sup>393</sup>

The key to having the pension board's decision relating to the denial or termination of a pension affirmed by the courts is to make sure that all of the necessary legal steps have been taken during the adjudication process. This means that the decision must be in accordance with Illinois law and that a complete evidentiary record is made at the time of the hearing before the pension board. There must also

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<sup>391</sup> 40 ILCS 5/3-111, 5/3-114.1, 5/3-114.2, 40 ILCS 5/3-112.

<sup>392</sup> See, Donnenberg vs. Frantz, 41 Ill.App.2d 150, 190 N.E.2d 132 (1963).

<sup>393</sup> Esner vs. North Riverside Fire Pension Fund, 68 Ill.App.3d 541, 386 N.E.2d 288, 25 Ill. Dec. 17 (1978); Caaewe vs. Police Pension Board of Midlothian, 184 Ill.App.3d 482, 540 N.E.2d 453, 132 Ill.Dec. 713 (1989).

be sufficient evidence in the record to support the pension board's decision. The board's decision should also contain specific findings supporting the action taken. Such written findings are a prerequisite to proper judicial review of any pension board decision.

**C. §9.3        ARTICLE 3 BENEFITS**

As indicated above, there are three distinct types of benefits set forth in Article 3. The substantive elements of each type are different. Police officers are entitled to a pension upon mandatory or voluntary retirement, if the officer has the required years of creditable service and required age.<sup>394</sup> The amount of the officer's retirement pension depends upon hiring date, length of service, age of the officer and whether the retirement was voluntary or mandatory.

Article 3 provides for two types of disability pension benefits to police officers who sustain injury or sickness. These are:

- (a) Line of duty disability benefits;<sup>395</sup>
- (b) Not on duty disability benefits.<sup>396</sup>

There are a number of important differences and distinctions between these types of disability pension benefits. These distinctions impact upon both the pension fund and the police officer applying for the benefits.

Finally, the Pension Code provides for survivors' benefits for the police officer's immediate family members. The adjudication of survivors' benefits is also discussed further on in this Chapter. The following sections examine these benefits in greater detail. The elements a police officer must prove in order to obtain each type of pension benefit will vary.

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<sup>394</sup> 40 ILCS 5/3-111(b).

<sup>395</sup> 40 ILCS 5/3-114.1.

<sup>396</sup> 40 ILCS 5/3-114.2. An occupational disease disability pension is also available for police officers who have firefighting duties. See 40 ILCS 5/3-114.6.

**D. §9.4      DETERMINING ELIGIBILITY  
FOR DISABILITY BENEFITS**

In order to receive a disability pension, an applicant must first establish eligibility or entitlement to the benefit. The applicant must be a police officer at the time of filing for his or her application for disability benefits. If the applicant has resigned or been terminated prior to his filing for a disability pension, the application should be denied.<sup>397</sup> However, the courts have held that a police officer who files an application for a disability pension and then resigns or is terminated, is still entitled to receive a disability pension if otherwise eligible.<sup>398</sup>

**1. §9.5    DUTY RELATED DISABILITY PENSION**

The statutory language concerning the receipt of a disability sustained while on duty is as follows:

**§3-114.1      Disability pension – Line of duty.**

- (a) If a police officer as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty is found to be physically or mentally disabled for service in the police department, so as to render necessary his or her suspension or retirement from the police service, the police officer shall be entitled to a disability retirement pension equal to the greatest of (1) 65% of the salary attached to the rank on the police force held by the officer at the date of suspension of duty or retirement, (2) the retirement pension that the police officer would be eligible to receive if he or she retired (but not including any automatic annual increase in that retirement pension), or (3) the pension provided under subsection (d), if applicable.

A police officer shall be considered “on duty” while on any assignment approved by the chief of the police department of the municipality he or she serves, whether the assignment is within or outside the municipality.<sup>399</sup>

The burden of proving the entitled to a line of duty disability pension rests with the applicant.<sup>400</sup>

<sup>397</sup> Difalco vs. Wood Dale Firemen's Pension Fund, 122 Ill.2d 22, 521 N.E.2d 923, 118 Ill.Dec. 446 (1988).

<sup>398</sup> Iwanski vs. Streamwood Police Pension Board, 232 Ill.App.3d 180, 596 N.E.2d 691, 173 Ill.Dec. 67 (1992); Swiatek vs. Bensenville Police Pension Board, 205 Ill.App.3d 85, 562 N.E.2d 1270, 150 Ill.Dec. 467 (1990); Stec vs. Oak Park Police Pension Board, 204 Ill.App.3d 556, 561 N.E.2d 1234, 149 Ill.Dec. 538 (1990); Fenton vs. Murphysboro Police Pension Board, 203 Ill.App.3d 714, 561 N.E.2d 105, 148 Ill.Dec. 799, (1990).

<sup>399</sup> 40 ILCS 5/3-114.1(a).

The elements that a police officer must prove in order to obtain a line of duty disability pension are as follows:

- (1) he or she is a police officer;
- (2) an accident, injury or sickness was incurred;
- (3) from the performance of an act of duty;
- (4) the officer is found to be physically or mentally disabled; and,

(5) the disability renders necessary his or her suspension or retirement from police service.<sup>401</sup>

There is no creditable service requirement imposed upon a police officer seeking a duty disability pension under 5/3-114.1. Thus, a police officer injured on duty during his or her first day of work can file an application for a line of duty disability pension. If a line of duty disability pension is granted, the police officer is entitled to receive a disability pension of 65%, and up to 75% of the officer's salary at the time of the suspension.<sup>402</sup> This pension is not subject to income taxation.

## 2. **§9.6 NOT ON DUTY DISABILITY PENSION**

The statutory provision providing for a not in duty disability pension under Article 3 of the Pension Code states:

### **§3-114.2. Disability pension-not in duty.**

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<sup>400</sup> Ryndak vs. River Grove Police Pension Board, 248 Ill.App.3d 486, 618 N.E.2d 606, 188 Ill.Dec. 36 (1993); Evert vs. Firefighters' Pension Fund of Lake Forest, 180 Ill.App.3d 656, 536 N.E.2d 143, 129 Ill.Dec. 459 (1989).

<sup>401</sup> Marconi vs. Chicago Heights Police Pension Board, 225 Ill.2d 497, 870 N.E.2d 273, 312 Ill.Dec. 208 (2006); Hodges vs. Granite City Police Pension Fund, 73 Ill.App.3d 978, 392 N.E.2d 417 (1979); Wall vs. Schaumburg Police Pension Board, 178 Ill.App.3d 438, 833 N.E.2d 458, 178 Ill.Dec. 586 (1989); English vs. Northfield Police Pension Board, 172 Ill.App.3d 344, 526 N.E.2d 588, 122 Ill.Dec. 329 (1988).

<sup>402</sup> 40 ILCS 5/3-114.1(a).

A police officer who becomes disabled as a result of any cause other than the performance of an act of duty, and who is found to be physically or mentally disabled so as to render necessary his or her suspension or retirement from police service in the police department, shall be entitled to a disability pension of 50% of the salary attached to the officer's rank on the police force at the date of suspension of duty or retirement.<sup>403</sup>

The elements that a police officer must prove in order to receive a non-duty disability

are as follows:

- (1) He or she is a police officer;
- (2) an accident, injury or sickness occurred as a result of any cause other than the performance of an act of duty;
- (3) The officer is found to be physically or mentally disabled; and,
- (4) renders necessary his or her suspension from police service.<sup>404</sup>

There is also no creditable service requirement when an officer seeks a non-duty pension.

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<sup>403</sup> 40 ILCS 5/3-114.2.

<sup>404</sup> See, Batka vs. Orland Park Police Pension Fund, 186 Ill.App.3d 715, 542 N.E.2d 839, 134 Ill.Dec. 489 (1989).

A non-duty related benefit entitles the police officer to receive a disability pension of 50% of the officer's salary at the time of suspension from duty. There is, however, a minimum pension amount of \$400.00 per month. This benefit is subject to taxation.

An issue that has yet to be resolved is whether the term "any cause other than an act of duty" covers every conceivable malady or affliction, whether voluntary or involuntary. The statute specifies payment of a non-duty disability for *any cause* other than an act of duty.<sup>405</sup> However, in one case, a survivorship pension was denied under Article 4 of the Pension Code where a firefighter was killed while committing burglary.<sup>406</sup> In a similar situation, the appellate court has ruled that public policy precluded a police officer from receiving a non-duty disability pension because of mental depression which developed due to his own criminal misconduct, where the charges were found to be true.<sup>407</sup>

**D. §9.7        DETERMINING THE APPROPRIATE  
DISABILITY BENEFIT**

Among the more difficult decisions that any pension board must make concerns what type of a disability pension is an applicant entitled to. Under Article 3, a police pension board must decide whether the alleged disability results from the performance of an act of duty or results from any cause other than an act of duty. Currently, the issue most often litigated is whether the police officer was entitled to a line of duty disability pension when the pension board only granted a non-duty disability pension.

Because of the similarity in language and due to the fact that the Pension Code was enacted to provide police officers with benefits similar to those provided under the Workers' Compensation

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<sup>405</sup> *Id.*; 40 ILCS 5/3-114.2. Pension Boards have granted non-duty disability pensions in cases of pregnancy and AIDS.

<sup>406</sup> Passarella vs. Melrose Park Firemen's Pension Board, 1061 Ill.App.2d 448, 245 N.E.2d 913 (1969).

<sup>407</sup> Jagielski vs. Mundelein Police Pension Board, 271 Ill.App.3d 869, 649 N.E.2d 527, 208 Ill.Dec. 471 (1995).

Act,<sup>408</sup> the standard developed under that Act is analogous to disability pension claims under Article 3.

As such, cases decided under the Workers' Compensation Act are often cited in pension board disability proceedings.<sup>409</sup> However, there are a number of distinctions between the disability provisions of Article 3 of the Pension Code and the Workers' Compensation Act. As such, appellate court decisions under the Pension Code take precedence over cases decided under the Workers' Compensation Act.

Since most disability pension claims are generally decided to everyone's satisfaction by the pension board, only the doubtful or contested cases reach the courts. The decision of the board generally depends upon the facts and circumstances of each case. However, the general question usually involved in each case is whether there is a causal connection between the performance of an act of duty and the injury or illness that mandates a finding of disability.

The mere fact that a police officer is injured or becomes ill on duty or while in uniform does not automatically entitle the officer to a duty disability pension. The statute (§3-114.1) requires that the injury must be incurred in or result from an act of duty.<sup>410</sup> Once again, the burden of proving an act of duty injury or causation is on the disability applicant.

Obviously, all pension boards want to make the right decision as to whether a disability pension applicant is entitled to a duty related disability benefit, a non-duty disability benefit or no disability benefit at all. Furthermore, pension boards want to have their decisions upheld by the courts. The key

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<sup>408</sup> See, 820 ILCS 305/1.

<sup>409</sup> See, Mabie vs. Village of Schaumburg, 364 Ill.App.3d 756, 847 N.E.2d 796, 301 Ill.Dec. 786 (2006); Mulack vs. Hickory Hills Police Pension Board, 252 Ill.App.3d 1063, 625 N.E.2d 259 192 Ill.Dec. 259 (1993); Kellan vs. Park Ridge Firemen's Pension Fund, 194 Ill.App.3d 573, 551 N.E.2d 264, 141 Ill.Dec.271 (1990); O'Donnell vs. City of Chicago, 126 Ill.App.3d 548, 467 N.E.2d 971, 81 Ill.Dec. 849 (1984).

<sup>410</sup> English vs Northfield Police Pension Board, 172 Ill.App.3d 344, 526 N.E.2d 588 (1988); Morgan vs Retirement Board of Policemen's Annuity and Benefit Fund, 172 Ill.App.3d 273, 526 N.E.2d 493 (1988); White vs. City of Aurora, 323 Ill.App.3d 733, 753 N.E.2d 1244, 257 Ill.Dec. 618 (2001).

to making the right decision and having that decision upheld in court requires a number of factors.

Among these factors are:

- (A) Complete knowledge of the facts surrounding the disability claim;
- (B) Detailed and comprehensive medical evidence and documentation;
- (C) Presentation of expert and non-expert testimony in order to allow complete exploration of the facts and circumstances surrounding the injury;
- (D) According the applicant a fair and impartial hearing;
- (E) Creation of an adequate record for the court to review;
- (F) Making sure that the written decision issued by the board contains findings, conclusions, reasoning and references to legal authority to support the board's determination and that the decision advises the participant or beneficiary of the right to appeal.<sup>411</sup>
- (G) Assistance of competent legal counsel.

The decision to grant or deny a disability benefit, or the decision as to what type of benefit to award, is one of the most important decisions that a police pension board can make. This is true for both the disability applicant as well as the other participants in the pension fund. The granting or denial of such benefits can be costly to all of the parties involved.

## **1. §9.8 DETERMINING WHETHER THERE IS A DISABILITY**

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<sup>411</sup> Johnson vs. State Employees' Retirement System, 155 Ill.App.3d 616, 508 N.E.2d 351, 108 Ill.Dec. 190 (1987). Such advice, although not mandatory, is advisable.

In determining what type of disability pension to award, the first issue a pension board must decide is whether or not the police officer is in fact disabled. This determination is a pre-requisite for either a line-of-duty disability pension<sup>412</sup> or a not on duty disability pension.<sup>413</sup> The physical or mental condition of the police officer must exist to such an extent that it renders necessary the officer's suspension or retirement from service in the police department.

The question of whether or not the police officer is actually disabled is usually resolved by expert medical testimony of the pension board's examining physicians and the police officer's treating and examining physicians.

The Pension Code requires that a disability pension cannot be granted unless the disability is certified by three physicians selected by the board.<sup>414</sup> According to the supreme court, the medical reports of the board's three physicians do not have to be unanimous in their opinions as to the existence of disability.<sup>415</sup>

## **2. §9.9 DETERMINING CAUSATION**

Once the Pension Board determines that the police officer is disabled, the next step is for the board to decide whether or not the disability resulted from the performance of an act of duty. This analysis generally consists of two components. These are:

(A) What was the nature of the act that the police officer was performing?

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<sup>412</sup> 40 ILCS 5/3-114.1.

<sup>413</sup> 40 ILCS 5/3-114.2.

<sup>414</sup> 40 ILCS 5/3-115.

<sup>415</sup> Wade vs. City of North Chicago Police Pension Board, 226 Ill.2d 485, 877 N.E.2d 1101, 315 Ill.Dec.772 (2007).

(B) Did the performance of that act actually cause or result in the disability?

According to one Illinois Supreme Court decision, the determining factor as to whether an act of duty is being performed would be the capacity in which the police officer is acting.<sup>416</sup> For instance, in that police pension case, the officer involved was considered to be performing an act of duty when crossing a street in Chicago while responding to the call of a citizen in need of assistance. Since the police officer was injured while performing that particular function, he was held to be entitled to a duty disability pension.<sup>417</sup> In that case the Illinois Supreme Court reasoned as follows:

Police officers assigned to duties that involve protection of the public: discharge those duties by performing acts which are similar to those involved in many civilian occupations. Driving an automobile, entering a building, walking up stairs, and even crossing the street are activities common to many occupations, be it policeman or plumber.

There can be little question, police officers assigned to duties that involve protection of the public discharge their responsibilities by performing acts which are similar in many civilian occupations. The crux is the capacity in which the police officer is acting.<sup>418</sup>

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<sup>416</sup> See, Johnson vs. Retirement Board of the Policemen's Annuity and Benefit Fund, 114 Ill.2d 518, 502 N.E.2d 718, 104 Ill.Dec. 221 (1986).

<sup>417</sup> Johnson vs. Retirement Board of the Policemen's Annuity and Benefit Fund, 502 N.E.2d at 720.

<sup>418</sup> Johnson, supra, 502 N.E.2d at 720.

The key factor then is the nature of the act in which the police officer is performing when the injury occurred. The act must involve a special risk not ordinarily assumed by average citizens. In the above case, the act of duty consisted of the police officer's responding to the call for assistance by a citizen.

Despite the above supreme court decision, there was a split in the various appellate courts over what constituted an act of duty under §3-114.1 of the Illinois Pension Code, 40 ILCS 5/3-114.1. This issue was addressed by the Illinois Supreme Court in Robbins vs. Carbondale Police Pension Fund.<sup>419</sup>

In Robbins, the police officer sought a duty disability pension based upon a psychological condition relating to job stress. The pension board denied Robbins a line-of duty disability pension, but granted him a non-duty disability pension. Robbins sued the pension board and on administrative review the circuit court affirmed the pension board's decision. However: on appeal, the appellate court reversed. The case then proceeded to the Illinois Supreme Court, which in turn reversed the appellate court and once again, affirmed the pension board's decision.

Unlike the situation in Johnson, the issue in Robbins involved causation – what caused the police officer to become disabled. The issue in Robbins was what constitutes an "act of duty" for purposes of granting a line of duty disability pension under Article 3. The supreme court began by noting that Article 3 of the Pension Code does not define the term "act of duty." However, that term is defined in Article 5 of the Pension Code, dealing with the pension system of the City of Chicago. It is appropriate, according to the Illinois Supreme Court for Article 3 police pension boards to apply the definition of "act of duty" that is contained in Article 5. That definition provides as follows:

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<sup>419</sup> 117 Ill.2d 533, 687 N.E.2d 39, 227 Ill.Dec. 116 (1997).

"Act of Duty. 'Act of duty': Any act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State or by the ordinances or police regulations of the city in which this Article is in effect or by a special assignment; or any act of heroism performed in the city having for its direct purpose the saving of the life or property of a person other than the policeman." 40 ILCS 5/5-113.

Following a number of prior appellate court decisions, the supreme court in Robbins held that in order for a police officer to obtain a line-of-duty disability pension under Article 3, the police officer's disability must also result from a special risk, not ordinarily assumed by a citizen in the ordinary walks of life. Under Robbins, it is not enough that police service was a factor in the disability. The disability applicant must prove that the disability was a result of a specific act of police service.

The determination as to whether a disability is duty related or not duty related will normally depend upon the facts in each particular case. Where the disability claimant has failed to identify or prove a specific line of duty origin for the disability: the courts are generally reluctant to overturn the pension board's denial of a duty related benefit.<sup>420</sup>

#### a. §9.10 **THE SPECIAL RISK REQUIREMENT**

The difference between the two supreme court cases discussed above, Johnson and Robbins, is that in Johnson there was no dispute as to what caused the injury, while in Robbins, there was an issue as to causation. However, both cases make one point clear – in order to obtain a line-of-duty disability pension, the police officer must be engaged in a "special risk" activity not ordinarily assumed by citizens in ordinary walks of life.<sup>421</sup> Under the "special risks" requirement,

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<sup>420</sup> English vs. Northfield Police Pension Board, *supra*; Wall vs. Schaumburg Police Pension Board, 178 Ill.App.3d 438, 533 N.E.2d 458 (1989); Fithian vs. Retirement Board, 85 Ill.App.3d 950, 407 N.E.2d 737 (1980); Hodges vs. Granite City Police Pension Fund, 73 Ill.App.3d 978, 392 N.E.2d 417 (1979); Olson vs. Wheaton Police Pension Board, 153 Ill.App.3d 595, 505 N.E.2d 1387 (1987).

<sup>421</sup> See, 40 ILCS 5/5-113.

merely being injured while on duty does not entitle an applicant to a line-of-duty disability pension.<sup>422</sup> However, there is an apparent split in the appellate court decisions as to what police activities qualify as a special risk activity.<sup>423</sup>

From the above, it is clear that the issue of causation of the disability plays an important part in the determination as to the granting of a line-of-duty disability. In addition, the pension board must also examine whether or not the nature of the act that the police officer was involved in at the time of the injury involved a special risk activity. Under current case law, if there is no special risk activity there can be no line-of-duty pension.

### **3.     §9.11 LINE OF DUTY DISABILITY GRANTED – SPECIAL RISK FOUND**

Line of duty disability benefits, based upon the finding of a special risk activity, have been awarded in the following situations:

- (a)   A police officer, while on duty directing traffic slips on wet pavement while crossing the street, responding to a citizen's request for assistance;<sup>424</sup>
- (b)   A police officer who was injured when he stumbled and fell while bringing an arrestee down a steep embankment;<sup>425</sup>

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<sup>422</sup> White vs. City of Aurora, 323 Ill.App.3d 733, 753 N.E.2d 1244, 257 Ill.Dec. 618 (2001).

<sup>423</sup> Compare White, supra, with Alm vs. Lincolnshire Police Pension Board, 352 Ill.App.3d 595, 816 N.E.2d 389, 287 Ill.Dec. 627 (2004).

<sup>424</sup> Johnson vs. Retirement Board of the Policemen's Annuity and Benefit Fund, 114 Ill.2d 518, 502 N.E.2d 518, 104 Ill.Dec. 221 (1986).

<sup>425</sup> Wade vs. City of North Chicago Police Pension Board, 226 Ill.2d 485, 877 N.E.2d 1101, 315 Ill.Dec. 772 (2007).

- (c) A police officer, while off duty, is killed when he investigates a complaint of rape by one of his neighbors who has sought the officer's help because he was a policeman.<sup>426</sup>
- (d) A police officer who injured his shoulder while lifting a malfunctioning railroad gate was entitled to a line-of-duty disability pension because he was involved in a special risk not borne by ordinary citizens.<sup>427</sup>
- (e) A police officer who injured his back while performing police department physical training was entitled to a line of duty disability pension according to the appellate court.<sup>428</sup>
- (f) A police officer who suffered an impaired mental condition as a result of an injury suffered eleven years earlier transporting a prisoner was awarded a duty related disability pension.<sup>429</sup>
- (g) A line-of-duty disability pension was granted where a police officer assigned to an undercover narcotics unit developed emotional problems, had reoccurring nightmares and homicidal ideation.<sup>430</sup>
- (h) The award of a duty related disability pension was affirmed where the police officer suffered panic attacks while doing narcotics work and as a result of negative interactions with the police chief.<sup>431</sup>

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<sup>426</sup> Davis vs. Retirement Board of the Policemen's Annuity and Benefit Fund, 4 Ill.App.3d 221, 280 N.E.2d 735 (1972).

<sup>427</sup> Sarkis vs. City of Des Plaines, 378 Ill.App.3d 833, 882 N.E.2d 1268, 318 Ill.Dec. 145 (2008).

<sup>428</sup> Stackowicz vs. Frankfort Police Pension Board, No. 3-00-0732 (2201) (Rule 23).

<sup>429</sup> Gibbons vs. Retirement Board of the Policemen's Annuity and Benefit Fund, 412 Ill. 373, 106 N.E.2d 516 (1952).

<sup>430</sup> Knight vs. Village of Bartlett, 338 Ill.App.3d 892, 788 N.E.2d 205, 272 Ill.Dec. 901 (2003).

- (i) A police officer who injured his back while attempting to remove concrete blocks after responding to a citizen's call reporting juveniles stacking parking blocks was entitled to a line-of-duty disability pension.<sup>432</sup>
- (j) A line-of-duty disability pension was awarded by the appellate court where the officer was driving a police transport van on patrol intending to investigate an area that had reports of speeding and was struck by another vehicle and injured. Although this officer was not responding to a call, he was conducting his patrol and he faced special risks associated with being on patrol duty.<sup>433</sup>
- (k) A police officer who was injured while aiding a neighbor while off duty near his home and outside the jurisdiction of his police department was granted a duty disability pension by the court.<sup>434</sup>

#### **4. §9.12 LINE OF DUTY DISABILITY DENIED – NO SPECIAL RISK FOUND**

The courts have found that there was no special risk activity or the injury to the police officer did not give rise to a line of duty disability in the following instances:

- (a) A police officer who drowns on vacation while swimming to seek help for a drowning companion.<sup>435</sup>

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<sup>431</sup> Village of Stickney vs. Board of Trustees of the Police Pension Funds of Stickney, 363 Ill.App.3d 58, 842 N.E.2d 180, 299 Ill.Dec. 441 (2005).

<sup>432</sup> Merlo vs. Orland Hills Police Pension Board, 383 Ill.App.3d 97, 890 N.E.2d 612, 321 Ill.Dec. 890 (2008).

<sup>433</sup> Jones vs. Board of Trustees of the Bloomington Police Pension Board, 384 Ill.App.3d 1064, 894 N.E.2d 962, 323 Ill.Dec. 936 (2008).

<sup>434</sup> Herroun vs. Addison Police Pension Board, 372 Ill.App.3d 260, 865 N.E.2d 273, 309 Ill.Dec. 910 (2007).

<sup>435</sup> Brynes vs. Retirement Board, 339 Ill.App. 55, 89 N.E.2d 59 (1949).

- (b) A police officer who sustains an injury when he slips and falls exiting his squad car to write a parking citation.<sup>436</sup>
- (c) A duty disability was denied to a police officer who injured his back when he slipped off a chair while filling out a police report at the police station.<sup>437</sup>
- (d) Line of duty disability pensions have been denied where the police officer's failed to prove that their psychological disability was caused by a specific act of police duty.<sup>438</sup>
- (e) A police officer claiming a duty disability pension because of knee injuries allegedly sustained while making arrests was only entitled to a not on duty pension. The pension board found that the officer's claim of duty-related injury was not worthy of relief based upon the officer's lack of credibility and inconsistent actions regarding an off-duty injury. The appellate court ruled that the pension board's decision was not against the manifest weight of the evidence.<sup>439</sup>
- (f) A police officer who was in the process of entering his squad car to go on patrol when another officer accidentally ran over his foot, was not entitled to a line-of-duty disability pension, because he was not involved in a special risk activity at the time of his injury.<sup>440</sup>

<sup>436</sup> White vs. Aurora Police Pension Board, 321 Ill.App.3d 733, 753 N.E.2d 1244, 257 Ill.Dec. 618 (2001).

<sup>437</sup> Morgan vs. Retirement Board of the Policemen's Annuity and Benefit Fund, 172 Ill.App.3d 273, 526 N.E.2d 493, 122 Ill.Dec. 234 (1988).

<sup>438</sup> Robbins vs. Carbondale Police Pension Fund, 177 Ill.2d 533, 687 N.E.2d 39, 227 Ill.Dec. 116 (1997); Olson vs. Wheaton Police Pension Board, 153 Ill.App.3d 595, 505 N.E.2d 1387 (1987); Rentfrow vs. Effingham Police Pension Fund, 170 Ill.App.3d 617, 525 N.E.2d 176 (1988); Wall vs. Schaumburg Police Pension Board, 178 Ill.App.3d 438, 533 N.E.2d 458 (1989); Ryndak vs. River Grove Police Pension Board, 248 Ill.App.3d 486, 618 N.E.2d 606. 188 Ill.Dec. 36 (1993).

<sup>439</sup> Rhoads vs. Calumet City Police Pension Board, 293 Ill.App.3d 1070, 689 N.E.2d 266, 228 Ill.Dec. 394 (1997). [Rhoads I].

<sup>440</sup> Filskov vs. Board of Trustees of the Northlake Police Pension Fund, 409 Ill.App.3d 66, 946 N.E.2d 1095, 349 Ill.Dec. 599 (2011).

(g) A police officer who was an evidence technician drove an unmarked squad car to photograph suspects at a jail. Before returning to the police station, the officer drove to meet another officer to return the camera he had been using to photograph the suspects. While stopped at a red light the police officer was rear-ended by another vehicle. The court affirmed the pension board's denial of a line-of-duty disability pension, finding no special risk activity.<sup>441</sup>

## 5. **§9.15 PRE-EXISTING CONDITIONS**

A common issue in pension disability cases concerns the situation where the police officer claims a duty related disability pension which stems from a pre-existing medical condition. For example, an officer may have congenital back defect which he aggravates while on duty. The issue then becomes – is the injury duty related? In order to receive a duty-related disability pension arising out of a pre-existing or intervening condition, the applicant must establish a sufficient nexus or connection between the injury or illness and the performance of duty.

However, there is no requirement that the duty-related incident be the originating or primary cause of the disability, so long as there is a sufficient nexus between the injury and the performance of an act of duty.<sup>442</sup> If the line-of-duty incident aggravates a pre-existing condition, a line-of-duty disability can be awarded.<sup>443</sup> Once again, resolution of this issue depends upon the facts in each particular case.

## G. **§9.14 HEART ATTACK OR STROKE**

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<sup>441</sup> Fedorski vs. Board of Trustees of the Aurora Police Pension Fund, 375 Ill.App.3d 371, 873 N.E.2d 15, 313 Ill.Dec. 720 (2007).

<sup>442</sup> Barber vs. South Barrington Police Pension Fund, 256 Ill.App.3d 814, 630 N.E.2d 446, 196 Ill.Dec. 511 (1993).

<sup>443</sup> Olson vs. Wheaton Police Pension Board, 153 Ill.App.3d 595, 505 N.E.2d 1387, 106 Ill.Dec. 596 (1987).

Under Article 3, two conditions are automatically considered duty-related, even if pre-existing. If a police officer suffers a heart attack or stroke as a result of the performance and discharge of police duty, he or she will be considered as having been injured while on duty.<sup>444</sup> It would appear that from the language contained in the Pension Code, even if the police officer had a pre-existing heart condition, he or she would still be entitled to a duty-related disability pension.

#### F. **§9.15 DETERMINING SUSPENSION FROM DUTY**

One of the key elements of any disability pension is the requirement that there must be a suspension from duty.<sup>445</sup> The Pension Code indicates that a police officer working in that capacity receiving his regular rate of pay would seem to be precluded from filing a disability pension because the officer is still on duty and still being paid.<sup>446</sup> Under the Pension Code, a police officer can only obtain a disability pension if found to be physically or mentally disabled from service in the police department, so as to render necessary his or her suspension from police service. This provision also indicates that a police officer is considered on duty while on any assignment approved by the chief of police. The Illinois Supreme Court has held that the evidence of a light duty position precludes the granting of a disability pension.<sup>447</sup>

A pension board presented with a situation where the existence of light duty might be an issue should ensure that there is some evidence in the record as to whether or not a light-duty position exists and whether it is available to the applicant. A pension board's decision to deny a

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<sup>444</sup> 40 ILCS 5/3-114.3.

<sup>445</sup> 40 ILCS 5/3-114.1, 5/3-114.2.

<sup>446</sup> Peterson vs. Board of Trustees, 54 Ill.2d 260, 296 N.E.2d 721 (1973); Olson vs. Wheaton Police Pension Board, 153 Ill.App.3d 595, 505 N.E.2d 1387 (1987).

<sup>447</sup> Peterson, supra; see also, Mulder vs. Rockford Firemen's Fund, 103 Ill.App.2d 174, 242 N.E.2d 627 (1968); Van Ort vs. Board of Trustees, 337 Ill.App. 486, 86 N.E.2d 624 (1949).

police officer a disability pension due to availability of a light duty position was reversed where the pension board found that the officer could perform light duty. There was no evidence in the record to indicate the availability of any light-duty position within the police department. Since there was no evidence that such a position existed or was offered to the applicant, the court found that the pension board's decision was against the manifest weight of the evidence.<sup>448</sup> A denial of a disability pension based upon the existence of a light duty position was also reversed by the court where the evidence indicated that there was no established light duty position and the position was created solely for the purpose of depriving plaintiff of his disability pension.<sup>449</sup>

#### **G. §9.16 PSYCHOLOGICAL OR MENTAL DISABILITY**

An area that seems to be of increasing concern to police pension boards relates to disability claims based upon psychological or mental disabilities. It is often difficult for medical experts, let alone pension board trustees, to determine whether a mentally disabling condition exists. It is even more difficult to ascertain whether or not that condition results from the performance of an act of duty.

In cases involving mental disability, a pension board must be aware of three things:

- (1) The burden of proof is on the applicant;<sup>450</sup>
- (2) There must be a showing that the mental disability was caused while the police officer was engaged in a specific act of police service, involving a special risk, in order to obtain this type of duty;<sup>451</sup>

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<sup>448</sup> Thurow vs. Fox Lake Police Pension Board, 180 Ill.App.3d 683, 536 N.E.2d 155 (1989).

<sup>449</sup> Danko vs. Harvey Police Pension Board, 204 Ill.App.3d 633, 608 N.E.2d 333, 181 Ill.Dec. 260 (1992).

<sup>450</sup> Hodges vs. Granite City Police Pension Fund, 73 Ill.App.3d 978, 392 N.E.2d 417 (1979).

<sup>451</sup> Wall vs. Schaumburg Police Pension Board, 178 Ill.App.3d 438, 533 N.E.2d 458 (1989).

(3) The determination of mental or psychological disability will largely depend upon expert medical testimony.<sup>452</sup>

In one Illinois supreme court case addressing the issue, it was held that a police officer who sustained a head injury while on duty which resulted in pronounced mental disturbance, impairment of memory and judgment, was entitled to a duty related disability.<sup>453</sup> To date, every reported case in Illinois that has addressed the issue has held that in order to receive a duty related disability pension based upon a psychological disorder, the applicant must prove that the condition was caused by a specific act of police service involving a special risk not assumed by civilians and not from job stress, job dissatisfaction or general mental instability or incapacity.<sup>454</sup>

The Illinois courts will require the claimant to carry his burden of proof and establish that he or she is mentally disabled. In addition, if the applicant claims that the mental or psychological disability is duty related, the applicant must also prove causation. In other words, the applicant must connect up specific acts of police service with the psychological disability. General job stress is not enough.<sup>455</sup>

Duty related disability pensions based on psychological grounds have been denied in the following instances:

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<sup>452</sup> Batka vs. Orland Park Police Pension Board, 186 Ill.App.3d 715, 542 N.E.2d (1989); Coyne vs. Milan Police Pension Board, 347 Ill.App.3d 718, 807 N.E.2d 1276, 283 Ill.Dec. 455 (2004).

<sup>453</sup> Gibbons vs. Retirement Board, 412 Ill. 373 106 N.E.2d 516 (1952).

<sup>454</sup> Marconi vs. Chicago Heights Police Pension Board, 225 Ill.2d 497, 870 N.E.2d 273, 312 Ill.Dec. 208 (2006); Robbins vs. Carbondale Police Pension Fund, 177 Ill.2d 533, 687 N.E.2d 39, 227 Ill.Dec.116 (1997); Gray vs. Police Pension Board, 281 Ill.App.3d 508, 667 N.E.2d 136, 217 Ill.Dec.343 (1996); Ryndak vs. River Grove Police Pension Board, 248 Ill.App.3d 486, 618 N.E.2d 606, 188 Ill.Dec. 36 (1993); Trettenero vs. Aurora Police Pension Fund, 268 Ill.App.3d 58, 643 N.E.2d 1338, 205 Ill.Dec. 731 (1994); Iwanski vs. Streamwood Police Pension Board, 178 Ill.App.3d 180, 596 N.E.2d 691, 173 Ill.Dec. 67 (1992); Wall vs. Schaumburg Police Pension Board, 178 Ill.App.3d 438 533 N.E.2d 458 (1989); Olson vs. Wheaton Police Pension Board, 153 Ill.App.3d 595, 505 N.E.2d 1387 (1987); Rentfrow vs. Effingham Police Pension Fund, 170 Ill.App.3d 617, 525 N.E.2d 176 (1988).

<sup>455</sup> Ryndak, supra.

- (A) A police officer claiming police stress syndrome was not entitled to a duty related disability pension because there was no evidence that the alleged stress resulted from the performance of police duties;<sup>456</sup>
- (B) Police officers under investigation for misconduct or wrongdoing have been held not entitled to a duty-related psychological disability pension because their mental condition did not arise out of the performance of duty;<sup>457</sup>
- (C) A police claiming job related stress due to differences in management style with his superior and the fact that disciplinary charges were brought against him was not entitled to a duty-related disability according to the Illinois courts;<sup>458</sup>
- (D) The supreme court denied a line of duty disability pension to a police officer whose mental condition was only related to his general job duties.<sup>459</sup>
- (E) A pension board's denial of a psychological duty-related disability pension was upheld by the supreme court where there was medical evidence that the officer manufactured a blend of behavior and statements in order to obtain a disability pension.<sup>460</sup> In this case, the court found that the pension board's decision was not against the manifest weight of the evidence, even though three of the four medical professionals selected by the board to examine the officer concluded that he was disabled.

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<sup>456</sup> Wall vs. Schaumburg Police Pension Board, 178 Ill.App.3d 438 533 N.E.2d 458 (1988).

<sup>457</sup> Rentfrow vs. Effingham Police Pension Board, 170 Ill.App.3d 744, 525 N.E.2d 176 (1988); Jagielnik vs. Mundelein Police Pension Board, 271 Ill.App.3d 869, 649 N.E.2d 527, 208 Ill.Dec. 471 (1995).

<sup>458</sup> Olson vs. Wheaton Police Pension Board, 153 Ill.App.3d 505 N.E.2d 1387 (1987).

<sup>459</sup> Robbins vs. Carbondale Police Pension Fund, 177 Ill.2d 533, 687 N.E.2d 227 Ill.Dec.116 (1997).

<sup>460</sup> Marconi vs. Chicago Heights Police Pension Board, 225 Ill.2d 497, 870 N.E.2d 273, 312 Ill.Dec. 208 (2006);

- (F) An officer who suffered from panic attacks as a result of undercover narcotics work and negative interaction with his police chief was entitled to a duty disability pension. The appeal was taken by the municipality in that case.<sup>461</sup>

The courts have granted non-duty disability benefits in a number of cases involving psychological or mental problems. For example:

- (a) Police officers suffering from job-related stress were granted non-duty disability benefits in a number of cases.<sup>462</sup>
- (b) A police officer claiming he was mentally disabled through the use of alcohol and marijuana was found entitled to a non-duty disability pension.<sup>463</sup>

One appellate court decision has affirmed the denial of a non-duty disability pension because of psychological disability based upon public policy grounds.<sup>464</sup> The court affirmed the denial of the disability pension based upon Illinois public policy where the police officer's depression developed as a result of criminal charges being brought against the officer for making sexual advances to women while on duty.

Pension Boards have not met with success in every psychological disability case. A pension board's denial of line-of-duty disability pension benefits was reversed by the appellate court as being against the manifest weight of the evidence where the board's decision found that

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<sup>461</sup> Village of Stickney vs. Board of Trustees of the Police Pension Fund of Stickney, 363 Ill.App.3d 58, 842 N.E.2d 180 299 Ill.Dec. 441 (2005) (Stickney II).

<sup>462</sup> Batka vs. Orland Park Police Pension Board, 186 Ill.App.3d 715, 542 N.E.2d 835 (1989); Olson vs. Wheaton Police Pension Board, 153 Ill.App.3d 595, 505 N.E.2d 1387 (1987).

<sup>463</sup> Hahn vs. Woodstock Police Pension Board, 138 Ill.App.3d 206, 485 N.E.2d 871 (1985).

<sup>464</sup> Jagielski vs. Mundelein Police Pension Board, 271 Ill.App.3d 869, 649 N.E.2d 527, 208 Ill.Dec. 471 (1995) (Jagielski II).

the police officer could not be returned to duty because of “his present mental state.”<sup>465</sup> In another psychological disability case, the board’s denial of a duty disability pension was reversed and remanded because the board did not articulate sufficient reasons why it accepted only one out of six medical reports which found the applicant not to be psychologically disabled.<sup>466</sup>

#### **1. §9.17 ANALYZING PSYCHOLOGICAL DISABILITY CASES**

Since mental or psychological disability cases tend to be more difficult to disprove or refute because of the subjective nature of the condition, additional analysis by the pension board is necessary. In evaluating such claims, the following questions should be asked:

- (a) Is the applicant’s stress being caused by any other factors?
- (b) Does the applicant have a viral or endocrine disorder that causes stress or depression?
- (c) Is there evidence of a familial depressive condition?
- (d) Is the applicant using alcohol or other substances that cause depression?
- (e) Does the applicant have a history of past depression?
- (f) Is the depression a short-lived adjustment disorder?
- (g) Are the fully symptoms of depression present?
- (h) Is there an organic explanation for the personality disorder?
- (i) Is the applicant taking any medications that would cause depression?

These questions must be answered by medical experts specializing in this field. Detailed and understandable medical reports are essential.

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<sup>465</sup> Knight vs. Village of Bartlett, 338 Ill.App.3d 892, 788 N.E.2d 105, 272 Ill.Dec. 901 (2003).

<sup>466</sup> Coyne vs. Milan Police Pension Board, 347 Ill.App.3d 713, 807 N.E.2d 1276, 2832 Ill.Dec. 435 (2004).

**H. §9.18      DETERMINING BENEFIT AMOUNT  
IN DISABILITY CASES**

The type of disability pension granted determines how much the applicant will receive. A duty related disability benefit is paid at 65% and up to 75% of the salary attached to the rank held by the police officer at the time of suspension from duty.<sup>467</sup> A non-duty disability pension benefit is granted at a rate of 50% of the salary attached to the rank held by the officer at the time of the suspension from duty.<sup>468</sup> The benefit amount determination also requires a calculation as to what is the salary attached to the officer's rank at the date of his suspension of duty or retirement. Salary increases after the officer has left police service should not be included. One case has held that a municipality cannot retroactively increase a police officer's salary after the date of the officer's suspension from duty in order to increase his pension amount.<sup>469</sup>

**I. §9.19      TIME FRAME FOR ADJUDICATING  
PENSION CLAIMS**

There is no deadline for a pension board to decide pension claims. However, a pension board should attempt to adjudicate such cases in a timely manner.

Most disability pension applications can take several months to resolve. This time period is necessary in order to obtain the pension applicant's medical records and the scheduling of the independent medical examinations with the pension board's selected physicians. In some cases, witnesses may need to be interviewed or video surveillance may be required.

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<sup>467</sup> 40 ILCS 5/3-114.1.

<sup>468</sup> 40 ILCS 5/3-114.2.

<sup>469</sup> Rhoads vs. Calumet City Police Pension Board, 293 Ill.App.3d 1070, 228 Ill.Dec. 394 689 N.E.2d 266 (1997).

The federal court has held that a pension board's delay of eight months in awarding a pension did not amount of a violation of due process of law.<sup>470</sup> The supreme court has held that delay of 5 years in adjudicating a psychological disability claim did not amount to a constitutional law violation.<sup>471</sup> The court in that case specifically declined to put a deadline as to when a disability pension application must be adjudicated.

**J. §9.20        RE-EXAMINATION AND RETURN TO DUTY**

Once a disability benefit is granted, the police pension board's work is not done. A police officer receiving a disability pension benefit is not permanently retired.<sup>472</sup> The Illinois Pension Code requires that a pension board must re-examine a disability benefit recipient at least once each year prior to the attainment of age 50 as verification of the continuance of the disabling condition.<sup>473</sup> If it is determined that a disability benefit should no longer be paid to the pension recipient, the benefit should be terminated. The beneficiary should be given notice and an opportunity to be heard before his or her benefit is terminated, however.<sup>474</sup> Revocation of disability benefits is discussed in the following chapter.

**K. §9.21        RETIREMENT PENSION BENEFITS**

Illinois law also provides for retirement benefits to eligible police officer participants. Such benefits are referred to in the Code as a retirement pension as opposed to a disability pension.<sup>475</sup> The adjudication of retirement pension claims is usually not as complicated as the

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<sup>470</sup> Schroder vs. City of Chicago, 927 F.2d 957 (7th Cir. 1991).

<sup>471</sup> Marconi vs. Chicago Heights Police Pension Board, 225 Ill.2d 497, 870 N.E.2d 273, 312 Ill.Dec. 208 (2006).

<sup>472</sup> Peifer vs. Winnetka Police Pension Board, 35 Ill.App.3d 383, 342 N.E.2d 131 (1976).

<sup>473</sup> 40 ILCS 5/3-115.

<sup>474</sup> Wendl vs. Moline Police Pension Board, 961 Ill.App. 3d 382, 421 N.E.2d 584, 51 Ill.Dec. 949 (1981); Peacock vs. Calumet City Police Pension Fund, 395 Ill.App.3d 644, 918 N.E.2d 243, 335 Ill.Dec. 159 (2009).

<sup>475</sup> 40 ILCS 5/3-111.

adjudication of disability pension claims. The entitlement to a retirement pension will depend upon the following:

- (a) the date the applicant becomes a police officer;<sup>476</sup>
- (b) the officer's age at retirement;
- (c) the officer's years of creditable service;
- (d) the salary at the time of retirement.<sup>477</sup>

There is an important distinction between "retirement because of disability" and "retirement from active service." In the former instance, the police officer is not permanently retired from the police force. If the officer is no longer disabled his disability benefits are terminated and the officer returns to work. In the latter instance, the officer has permanently separated himself from police service.<sup>478</sup>

One issue that often arises in retirement pension determinations is the calculation of the officer's salary for pension purposes. Municipalities have attempted to increase an officer's salary shortly before retirement in order to increase the retirement pension amount. This is what is known as a "pension spike." In one case, a municipality increased a police chief's salary by over \$20,000.00 one week before retirement. The pension board scheduled a public hearing to determine what the pension amount should be and the chief sued, claiming the board had no authority to make salary determinations. The court ruled in the pension board's favor, finding that the pension board had the statutory authority to calculate the pension amount.<sup>479</sup>

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<sup>476</sup> 40 ILCS 5/3-111(d).

<sup>477</sup> 40 ILCS 5/3-111(a).

<sup>478</sup> See, Redding vs. Oak Park Police Pension Board, 115 Ill.App.3d 242, 450 N.E.2d 763 (1983). See also, Peifer vs. Winnetka Police Pension Board, 35 Ill.App.3d 383, 342 N.E.2d 131 (1976); Brown vs. City of Pekin, 129 Ill.App.3d 46, 472 N.E.2d 77 (1985).

<sup>479</sup> Sedlock vs. Board of Trustees of the Police Pension Fund of Ottawa, 367 Ill.App.3d 526, 845 N.E.2d 748, 305 Ill.Dec. 156 (2006).

In another pension calculation case, the pension board awarded retirement pensions which were found to be too high during a Department of Insurance audit. The municipality's treasurer unilaterally lowered the retirement pension amounts based on the audit. The pension trustees sued and the treasurer was ordered to make the pension payments as the trustees originally directed.<sup>480</sup>

#### **1.     §9.22   DISABILITY PENSION OPTION**

A police officer has the option of converting a disability pension into a retirement pension. A police officer over the age 50 who is receiving a disability pension may elect to receive a disability pension option if the period in which the disability benefit was paid and the officer's active service equals 20 years.<sup>481</sup> This election allows the police officer to receive a retirement pension at one-half the salary at the date of the retirement on disability in place of any payments for a regular retirement under §3-111 of the Pension Code.

#### **L.     §9.23       INVESTIGATING PENSION CLAIMS**

Whether the pension claim involves a disability, retirement or survivorship benefit, the pension board trustees must be in a position to make an informed decision based upon all of the pertinent facts. Sometimes this can be as easy as verifying creditable service for purposes of computing retirement pension. But often, complete knowledge of all pertinent facts requires an in depth investigation.

Some of the issues that often arise in complex pension cases include:

- (a) what is medically wrong with the applicant;

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<sup>480</sup> Morris vs. Harper, 393 Ill.App.3d 624, 912 N.E.2d 1288, 332 Ill.Dec. 402 (2009).

<sup>481</sup> 40 ILCS 5/3-116.1.

- (b) was the disability caused by or resulted from specific acts of service in the police department;
- (c) did the accident occur naturally;
- (d) did the accident occur as the applicant claims;
- (e) are there other possible causes for the injury or disability;
- (f) is the disability sufficient to warrant retirement;
- (g) is the disabling condition one that can be remedied;
- (h) Is the disability permanent or temporary;
- (i) Does the applicant have the necessary creditable service and age for a retirement pension;
- (j) Has there been any artificial increases to the applicant's salary;
- (k) Is surveillance necessary.

Each of the above issues can have a definite impact upon the outcome of a pension claim.

Adequate investigation prior to the hearing of a pension claim can take many forms.

These include: use of independent medical examinations, use of administrative subpoenas to obtain employment, tax, or medical records, use of independent investigators, and statements from potential witnesses. The important thing to remember about the investigation of pension claims is that any investigation should not be conducted by individual members of the pension board. This is because the pension board trustees are going to be the ultimate decision-makers in the case. As such, it is improper for trustees to be involved in prosecutorial or investigative functions related to the pension claims.<sup>482</sup> If the pension board determines that outside

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<sup>482</sup> Polk vs. Park Ridge Police Pension Board, 253 Ill.App.3d 525, 624 N.E.2d 1366, 192 Ill.Dec. 14 (1993).

investigation is required, the pension board's legal counsel should be in charge of the investigation process.

**M. §9.24      GENERAL PENSION BOARD  
HEARING PROCEDURES**

Pension board hearings are relatively informal and are not trial type adversary proceedings. Hearings are intended to be informal fact finding. However, certain rules of evidence are applicable and a number of legal procedures must be followed. Under the Code, police pension trustees are empowered to determine whether an applicant is entitled to a pension and to order payment of that pension. The failure to follow legal procedures by a pension board can result in the judicial reversal of the board's decision, the unnecessary expenditure of legal fees and expenses, or can result in a denial of a benefit to a police officer that should otherwise have been granted. Proper procedures in adjudicating pension or disability claims should be followed in all cases, no matter how clear-cut or simple. A pension board never can tell when a so-called "simple" case will turn into a legal nightmare. The procedures followed by the board of trustees may very well determine whether its decision will be affirmed or reversed by the reviewing court.

**1. §9.25 NOTICE AND OPPORTUNITY TO BE HEARD**

Administrative proceedings, including pension hearings, must conform to the constitutional requirements of due process of law.<sup>483</sup> This means that the disability applicant must be given notice of the proceedings, must be given a meaningful opportunity to be heard and must be allowed to present evidence and the right to legal counsel at his own expense. An

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<sup>483</sup> Peacock vs. Board of Trustees, 395 Ill.App.3d 644, 918 N.E.2d 243, 335 Ill.Dec. 159 (1st Dist. 2009); Wendl vs. Moline Police Pension Board, 96 Ill.App.3d 482, 421 N.E.2d 584, 51 Ill.Dec. 949 (1981).

administrative agency, such as a pension board, should not admit into the administrative record any evidence without first giving notice to an affected party who must be given the opportunity to cross-examine witnesses, inspect documents and offer evidence in rebuttal. The test of whether a notice of proceedings is adequate is whether the party receiving such notice should have anticipated the possible effects of the hearing on the basis of the notice.<sup>484</sup> Thus, the pension board's notification to the police officer must adequately inform the office of the type of proceeding he or she will be involved in.

A pension hearing need not take the form of a judicial or quasi-judicial proceeding.<sup>485</sup> However, a pension board should establish and follow uniform procedures in disability benefit hearings. The type of procedures that can be applied in such cases are discussed in subsequent sections. However, a pension board should try to be as fair as possible to the applicant when adjudicating disability benefit claims. These proceedings should not be treated as adversarial. One court has held that an officer was not denied a fair and impartial disability hearing when the pension board's attorney actively participated in the hearing and advised the board, while a second attorney conducted the examination of witnesses and preparation of evidence.<sup>486</sup> The hearing is not a case of the applicant against the pension board. The purpose of such hearing is to make a reasonable determination based upon the evidence presented. The pension board should remember that each decision may be reviewed and overturned in the circuit court. In conducting pension board hearings, it is important for

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<sup>484</sup> Baker vs. Illinois Racing Board, 101 Ill.App.3d 580, 427 N.E.2d 959, 56 Ill.Dec. 554 (1981).

<sup>485</sup> Morelli vs. Board of Education, 42 Ill.App.3d 722, 356 N.E.2d 438, 1 Ill.Dec. 312 (1976).

<sup>486</sup> Thurow vs. Fox Lake Police Pension Board, 180 Ill.App.3d 683, 536 N.E.2d 155, 129 Ill.Dec. 471 (1989).

trustees to remember that they have to decide each case fairly and they cannot appear to be biased.

## 2. **§9.26 TRUSTEE BIAS AND PREJUDICE**

Pension boards are sometimes faced with a motion to request that a pension trustee be removed from deciding a particular case because of bias or prejudice. A person challenging the impartiality of a pension board must overcome a presumption that those serving on the board are fair and honest.<sup>487</sup> In review of a claim of prejudice by a pension board trustee, the appellate court ruled that the village clerk of the municipality who was appointed to the board did not have to recuse herself from a disability pension proceeding merely because of her public position.<sup>488</sup>

If a claim of bias or prejudice of a pension trustee is made during a hearing, the proper procedure is for the trustee to indicate, on the record, whether or not that trustee can be fair and impartial. If the trustee so indicates, he or she does not have to be recused.

However, where it is shown that a pension trustee assumes the role of an advocate, rather than a disinterested decision-maker, the courts will reverse a pension board's denial of a pension.<sup>489</sup>

## 3. **§9.27 INTERVENTION**

It is now quite common in disability cases for the municipality to attempt to intervene in pension proceedings. It has been held that a pension board has the discretion to determine who

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<sup>487</sup> Turcol vs. Matteson Police Pension Board, 359 Ill.App.3d 795, 834 N.E.2d 490, 295 Ill.Dec. 909 (2005); Jackson vs. Retirement Board, 311 Ill.App.3d 62, 724 N.E.2d 145, 243 Ill.Dec. 836 (1999).

<sup>488</sup> Coyne vs. Milan Police Pension Board, 347 Ill.App.3d 713, 807 N.E.2d 1276, 283 Ill.Dec. 485 (2004).

<sup>489</sup> Williams vs. Morton Grove Firefighters' Pension Fund, 398 Ill.App.3d 680, 924 N.E.2d 38, 338 Ill.Dec. 178 (2010); Danko vs. City of Harvey Police Pension Fund, 240 Ill.App.3d 633, 608 N.E.2d 333, 181 Ill.Dec. 260 (1992).

can participate in a pension proceeding and to what extent.<sup>490</sup> In one case, the pension board's denial of the municipality's motion to intervene was affirmed. A Pension Board's decision to allow the municipality to intervene has also been affirmed.<sup>491</sup>

Once intervention is allowed, the intervenor becomes a party to all further proceedings. An intervenor can file suit against the board if it is in disagreement with the board's decision.

#### **4. §9.28 LEGAL REPRESENTATION**

The pension board's legal counsel should be involved in all but the most simple pension cases. If the pension board does not have a full time legal representative, it should hire an experience pension attorney for legal representation for all facets of pension proceedings. Often, cases before pension boards involve complicated situations or legal questions of first impression. Failure of a pension board to retain independent legal counsel familiar with this particular area of law could result in unnecessary costs, losses to the pension fund and perhaps liability for individual trustees.

It must also be remembered that the police officer or beneficiary appearing before the pension board has the right to have an attorney at his or her own expense. Copies of any notices or pleadings sent to a police officer should also be sent to the applicant's attorney if known.

An initial request for a continuance filed by the police officer or his attorney should probably be granted the first time such a request is made. Failure to grant a continuance may be considered an abuse of discretion by the courts.<sup>492</sup> However, requests for more than one continuance should be strictly scrutinized.

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<sup>490</sup> Village of Stickney vs. Board of Trustees of the Stickney Police Pension Fund, 347 Ill.App.3d 845, 807 N.E.2d 1078, 283 Ill.Dec. 237 (2004) (Stickney I).

<sup>491</sup> Williams vs. Morton Grove Firefighters' Pension Fund, 398 Ill.App.3d 680, 924 N.E.2d 38, 338 Ill.Dec. 178 (2010).

<sup>492</sup> Brown vs. Illinois Pollution Control Board, 37 Ill.2d 450, 227 N.E.2d 754 (1985).

## **5.     §9.29 SECURING EXPERT MEDICAL OPINIONS**

In disability benefit cases, the medical opinions of physicians examining the police officer is of crucial importance. The Pension Code provides that a pension disability can only be granted upon the certification of three practicing physician's that the officer is disabled.<sup>493</sup> The certifications or medical opinions from the three examining physicians need not be unanimous.<sup>494</sup> A pension board can utilize the medical reports of the applicant's treating physicians, if consistent with the opinions of the pension board's examining physicians.

The board's examining physicians should prepare and furnish to the board detailed reports as to his or her findings and conclusions. Most disability benefit cases will be determined by the medical evidence obtained. Thus, it is important that the medical reports introduced into evidence be detailed and comprehensive, and address the issues of disability and causation.

The pension board has the discretion to require other evidence of disability in addition to the medical reports of the examining physicians.<sup>495</sup> A pension board also has the discretion of having the applicant examined by more than three physicians.<sup>496</sup>

Even if a disability benefit is granted, Article 3 requires that a police officer on disability under the age of fifty be re-examined at least once per year.<sup>497</sup> The requirement of annual examination is an important one. Physical or mental conditions can change or improve over

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<sup>493</sup> 40 ILCS 5/3-115.

<sup>494</sup> Wade vs. City of North Chicago Police Pension Board, 226 Ill.2d 485, 877 N.E.2d 1101, 315 Ill.Dec. 772 (2007).

<sup>495</sup> 40 ILCS 5/3-115.

<sup>496</sup> McKee vs. Board of Trustees of the Champaign Police Pension Fund, 367 Ill.App.3d 538, 855 N.E.2d 571, 305 Ill.Dec. 404 (2006).

<sup>497</sup> 40 ILCS 5/3-115.

time, and if that happens, it is the pension board's responsibility to certify that the police officer can return to duty.<sup>498</sup>

#### N. **§9.30 ORDER OF PROOF IN PENSION HEARINGS**

As indicated above, the board is not required to hold a trial type of hearing. The formal rules of evidence need not be followed.<sup>499</sup> The following procedure is suggested:

- (1) The pension board president or attorney makes an opening statement detailing the procedures to be followed during the hearing;
- (2) The pension board introduces its exhibits into evidence;
- (3) The applicant or his or her counsel then makes an opening statement;
- (4) The applicant then may present any evidence to support the pension claim;
- (5) The pension trustees or legal counsel can then ask questions or cross-examine witnesses;
- (6) After all of the evidence is presented, the applicant or his or her legal counsel is given the opportunity to make a closing argument or file a post-hearing brief;
- (7) The hearing is closed and the matter is taken under advisement or the board can adjourn into executive session and decide the case;
- (8) A written decision is issued, which becomes the final decision of the board.

A court reporter should be used and all witnesses should be placed under oath. The board can also issue subpoenas for witnesses or for the production of documents.<sup>500</sup>

#### 1. **§9.31 MAKING AN ADEQUATE RECORD**

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<sup>498</sup> See, Antonelli vs. Hillside Police Pension Board, 287 Ill.App.3d 348, 678 N.E.2d 773, 222 Ill.Dec. 901 (1997).

<sup>499</sup> Sanders vs. Springfield Police Pension Board, 122 Ill.App.3d 1087, 445 N.E.2d 501, 68 Ill.Dec. 53 (1983).

<sup>500</sup> 40 ILCS 5/3-136.

It is imperative that the board make an adequate record if the pension board wants its decision affirmed. This means keeping track of all documents, exhibits and the transcript of proceedings and making reference to such in record. If the administrative record is adequate, the case will either be reversed or remanded.

**O.     §9.32           BOARD DECISIONS**

The board's decision should be in writing and should contain specific findings supporting the action taken by the board.<sup>501</sup> A copy of the decision should be mailed to the applicant by certified mail with a certificate of service attached to it.

**1.     §9.33    CERTIFICATE OF DISABILITY**

If the board decides to grant a disability benefit a certificate of payment is issued, signed by the board president and secretary stating the amount and purpose of payment.<sup>502</sup> A copy of the decision and certificate should be sent to the municipality.

**P.     §9.34           MODIFICATION OF DECISIONS**

Once the board renders a decision, it can only be modified within 35 days.<sup>503</sup>

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<sup>501</sup> Esner vs. North Riverside Firemen's Pension Fund, 78 Ill.App.3d 541, 386 N.E.2d 288, 25 Ill.Dec. 17 (1978).

<sup>502</sup> 40 ILCS 5/3-133.

<sup>503</sup> Rossler vs. Morton Grove Police Pension Board, 178 Ill.App.3d 769, 533 N.E.2d 927, 127 Ill.Dec. 845 (1989); *See also, Sola vs. Roselle Police Pension Board*, 342 Ill.App.3d 227, 794 N.E.2d 1055, 276 Ill.Dec. 805 (2003).

## **CHAPTER 10**

### **TERMINATION, REDUCTION AND FORFEITURE OF PENSION BENEFITS**

- A. §10.1 INTRODUCTION
- B. §10.2 RECOVERY FROM DISABILITY
- 1. §10.3 QAUNTUM OF MEDICAL EVIDENCE
- 2. §10.4 NOTICE AND OPPORTUNITY TO BE HEARD
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MISREPRESENTATION OR ERROR

## **CHAPTER 10**

### **TERMINATION, REDUCTION AND FORFEITURE OF PENSION BENEFITS**

- A. **§10.1** **INTRODUCTION**

The award of any type of pension benefit under Article 3 of the Pension Code is not absolute.

Such benefits can be lost or reduced in a number of ways. Generally, pension benefits can terminate or be reduced when an officer returns to duty or upon the entry of a worker's compensation settlement, upon recovery from disability, upon death of a participant or beneficiary, upon emancipation or upon commission of a felony in connection with police service. Each of these circumstances is discussed below.

#### **B. §10.2 RECOVERY FROM DISABILITY**

When a disability pension is granted, the Pension Code requires that the pension board must re-examine the beneficiary at least once per year for each year prior to attaining age fifty (50) in order to verify that the disability condition continues to exist.<sup>504</sup> After the pension recipient turns fifty, the annual examination requirement is no longer in effect.

The Pension Code provides that if a police officer retired on a disability pension is found upon medical examination to have recovered, the pension board shall terminate the disability pension. The disability pension cannot be terminated unless there is medical evidence that shows that the disability condition no longer exists.<sup>505</sup> In one case, a pension board's revocation of a disability pension because the officer was working in another police department was overturned by the court because there was no medical evidence to indicate that the officer had recovered and his duties in the second police department were not inconsistent with his claim of disability.<sup>506</sup> While it is not impossible for a pension board to certify that a police officer on disability as being fit for duty and no longer disabled, medical evidence of recovery is required. The appellate court has affirmed a pension board's decision

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<sup>504</sup> 40 ILCS 5/3-115.

<sup>505</sup> Martino vs. Police Pension Board of the City of Des Plaines, 331 Ill.App.3d 975, 772 N.E.2d 289, 365 Ill.Dec. 251 (2002).

<sup>506</sup> Martino, supra.

revoking a disability pension that had been in effect for over ten years.<sup>507</sup> Since there was medical evidence in the record that indicated the officer had recovered, the court held that the pension board's determination was not against the manifest weight of the evidence. In a similar situation, a police officer who was receiving a disability pension for fifteen years had his disability pension terminated where there was medical evidence in the record to indicate recovery.<sup>508</sup>

### **1. §10.3 QUANTUM OF MEDICAL EVIDENCE**

Pension Board trustees must also remember that the quantum of medical evidence necessary to award a disability pension is different from the evidence necessary to terminate a disability pension. Section 3-115 of the Code, 40 ILCS 5/3-115, requires that three physicians selected by the board must certify that the officer is disabled before a disability pension may be granted, while 40 ILCS 5/3-116 only states that if the police officer is found upon medical examination to have recovered, the disability terminates. In construing this provision, the courts have held that only one medical exam finding the officer no longer disabled is enough evidence to terminate the disability pension.<sup>509</sup>

### **2. §10.4 NOTICE AND OPPORTUNITY TO BE HEARD**

Administrative proceedings terminating a disability pension must conform to the requirements of due process. This means that before a police officer's disability pension can be terminated based upon recovery from disability, the pension recipient must be given notice and a hearing must be held.<sup>510</sup> The appellate court has held that the discontinuation of a police officer's disability pension without any

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<sup>507</sup> Antonelli vs. Hillside Police Pension Board, 287 Ill.App.3d 348, 678 N.E.2d 773, 222 Ill.Dec. 901 (1997).

<sup>508</sup> Peacock vs. Board of Trustees of the South Chicago Heights Police Pension Fund, 395 Ill.App.3d 644, 918 N.E.2d 243, 355 Ill.Dec. 189 (2009).

<sup>509</sup> Trettenero vs. Police Pension Fund of Aurora, 333 Ill.App.3d 792, 776 N.E.2d 847, 267 Ill.Dec. 468 (2002); Peacock vs. Board of Trustees of the South Chicago Heights Police Pension Fund, supra.

<sup>510</sup> Wendl vs. Moline Police Pension Board, 96 Ill.App.3d 482, 421 N.E.2d 584, 51 Ill.Dec. 949 (1981).

previous notice was a constitutional deprivation of a property right.<sup>511</sup> In that case, the police officer was entitled to continued disability benefits up until the time he was afforded a hearing. However, once a hearing was held the court found that the board's termination decision was not against the manifest weight of the evidence.<sup>512</sup>

### **3. §10.5 BURDEN OF PROOF IN DISABILITY TERMINATION PROCEEDINGS**

There is an apparent split of authority as to who bears the burden of proof when a police pension board attempts to terminate a disability pension based upon the pension beneficiary's recovery. One case holds that the burden remains on the police officer to prove his or her continued entitlement to a disability pension.<sup>513</sup> However, there is other case law holding that the pension board bears the burden of proof in disability pension termination proceedings.<sup>514</sup>

### **4. §10.6 RETURN TO DUTY AFTER TERMINATION OF DISABILITY PENSION**

One issue that has been the subject of litigation concerning the termination of an officer's disability pension is whether the police department must accept a police officer back to active duty. Upon finding a pension recipient is fit for duty, a pension board does not order his return to active duty. It only certifies to the police chief that the officer is no longer disabled.<sup>515</sup> In one case a police chief applied for a disability shortly before he was fired. He did not contest his discharge. He was granted a non-duty disability and when the pension board obtained medical evidence that he was no longer was

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<sup>511</sup> Peacock vs. Board of Trustees of the South Chicago Heights Police Pension Fund, 395 Ill.App.3d 644, 918 N.E.2d 243, 355 Ill.Dec. 189 (2009).

<sup>512</sup> *Id.*

<sup>513</sup> Peacock, supra.

<sup>514</sup> Wilfert vs. Retirement Board, 318 Ill.App.3d 507, 742 N.E.2d 368, 252 Ill.Dec. 118 (2001).

<sup>515</sup> 40 ILCS 5/3-116.

disabled, the disability pension was revoked. The circuit court reversed this revocation, finding the ex-chief was entitled to a disability pension because he could not be returned to his former position. The appellate court reversed and reinstated the board's decision because the ex-chief was legally terminated prior to the pension board's decision granting a pension.<sup>516</sup>

Given this decision, a police officer who resigns or is terminated after he or she files for a disability pension who then is found fit for duty has no right to return to the police department upon termination of his disability pension. However, a police officer not legally removed, has a right to return to duty if he is no longer disabled.<sup>517</sup> In one decision, it was held that a police officer who was granted a disability pension by a pension board was not required to seek a leave of absence from the board of fire and police commissioners. The police chief's attempt to fire the police officer upon his return to active duty after being found fit by the pension board was not sustained.<sup>518</sup>

#### C. **§10.7 REDUCTION OF DISABILITY PENSION BENEFITS**

Disability pension benefits may be reduced by a worker's compensation award. A police officer or his or her survivor who received disability benefits under the Pension Code and who also receives benefits for the same illness or injury under the Workers' Compensation Act<sup>519</sup> or Occupational Diseases Act<sup>520</sup> shall have his or her benefits reduced by the amounts paid under the above acts.<sup>521</sup> There shall be no reduction in a police officer's disability benefits for any of the following items:

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<sup>516</sup> Rhoads vs. Board of Trustees of the Calumet City Policemen's Pension Fund, 348 Ill.App.3d 835, 810 N.E.2d 573, 284 Ill.Dec. 783 (2004) (Rhoads II).

<sup>517</sup> Stone vs. Belvedere Police Pension Board, 13 Ill.App.3d 357, 300 N.E.2d 272 (1973).

<sup>518</sup> Parisi vs. Jenkins, 236 Ill.App.3d 42, 603 N.E.2d 566, 177 Ill.Dec. 496 (1992).

<sup>519</sup> 820 ILCS 305/1, *et seq.*

<sup>520</sup> 820 ILCS 310/1, *et seq.*

<sup>521</sup> 40 ILCS 5/3-114.5(a).

- (a) payments for medical services;
- (b) payments for non-medical remedial care; and
- (c) payments for the whole loss or partial loss of any bodily member.<sup>522</sup>

If the police officer incurs costs or attorney's fees in order to establish his or her workers' compensation claim, any such fees or costs are also subtracted before any reduction is made.<sup>523</sup>

Thus, if there is a Workers' Compensation case pending when the police officer's disability pension application is being processed and adjudicated, the pension board may want to obtain a copy of the settlement agreement entered in the Worker's Compensation case to determine how those benefits were paid. In most Workers' Compensation cases, the settlement is based upon the loss of a bodily member, so no reduction can be made by the pension board.

One case has held that where a police officer is granted a non-duty related disability pension the pension board could not reduce the disability benefit by any amounts paid to the police officer under the Worker's Compensation Act.<sup>524</sup> According to the appellate court, the purpose of this type of provision is to prevent an individual from recovering both pension benefits and workers' compensation benefits for the same injury. This does not occur, according to the court, when a disability pension applicant receives non-duty disability benefits and workers' compensation benefits for the same injury.<sup>525</sup>

There is another important aspect of a Workers' Compensation proceeding that a pension board adjudicating a disability claim must be aware of. When a Workers' Compensation claim is pending, the police officer usually receives temporary total disability benefits, which is 66  $\frac{2}{3}\%$  of his or her

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<sup>522</sup> *Id.*

<sup>523</sup> 40 ILCS 5/3-114.5(b).

<sup>524</sup> Eckman vs. Elgin Police Pension Board, 143 Ill.App.3d 757, 493 N.E.2d 671 (1986).

<sup>525</sup> Eckman, *supra*, 493 N.E.2d at 676.

salary. If a police officer is awarded a disability pension and the officer is receiving temporary total disability benefits (TTD), disability pension benefits should not be paid until the TTD benefits end.

**D. §10.8      LOSS OR REDUCTION OF RETIREMENT BENEFITS**

As with disability pension benefits, a police officer's retirement benefits can be lost or reduced in a number of ways. A police officer or his surviving spouse may sign a written waiver relinquishing the right to all or part of the retirement pension benefit.<sup>526</sup> This waiver of benefits takes effect upon being filed with the pension board and can only be revoked within the first thirty days after it is filed. If a police officer re-enters active service, the pension payments are also suspended while the officer remains in service.<sup>527</sup>

**E. §10.9      LOSS OF SURVIVORSHIP BENEFITS**

Pension benefits paid to a police officer's surviving spouse or children can also be terminated in certain instances. Dependent children only receive benefits until they are married or reach age eighteen.<sup>528</sup> The pension paid to a surviving spouse terminates upon his or her remarriage.<sup>529</sup>

**1. §10.10 REMARRIAGE AFTER RETIREMENT**

If a police officer who is receiving a disability or retirement pension remarries after being awarded such a pension, the new surviving spouse and any children are not entitled to survivorship benefits.<sup>530</sup>

**2. §10.11 EMANCIPATION**

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<sup>526</sup> 40 ILCS 5/3-117.1.

<sup>527</sup> 40 ILCS 5/3-124.1.

<sup>528</sup> 40 ILCS 5/3-112(a).

<sup>529</sup> 40 ILCS 5/3-121.

<sup>530</sup> 40 ILCS 5/3-120; Stec vs. Oak Park Police Pension Board, 355 Ill.App.3d 974, 824 N.E.2d 1138, 291 Ill.Dec. 888 (2005).

A child receiving a survivor's pension loses that pension upon attaining the age of eighteen or upon marriage. However, a child who is dependent because of physical or mental disability can still receive survivorship benefits.<sup>531</sup>

#### F. **§10.12 FORFEITURE OF PENSION BENEFITS**

Conviction of a felony relating to or arising from or in connection with service as a police officer results in a forfeiture of all future pension benefits.<sup>532</sup> Section 3-147 of the Pension Code provides:

Felony conviction. None of the benefits provided in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his or her service as a police officer.

This section shall not impair any contract or vested right acquired prior to July 11, 1955 under any law contained in this Article, nor preclude the right to a refund.

All persons entering service subsequent to July 11, 1955 are deemed to have consented to the provisions of this Section as a condition of coverage.<sup>533</sup>

Identical language is found in almost every Article of the Illinois Pension Code. In recent years, there has been a substantial amount of litigation on the subject of forfeiture of pension benefits.

A major issue in such cases is whether the person's felony conviction is related to, arising from or in connection with public or police service. Two separate tests have been developed by the courts. In one case, a police officer was convicted of mail fraud related to a scheme to defraud an insurance company by claiming an accidental injury that never occurred. The criminal conduct did not occur while the police officer was in uniform. Nevertheless, the supreme court upheld the pension forfeiture

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<sup>531</sup> 40 ILCS 5/3-112(a).

<sup>532</sup> Wright vs. Board of Trustees of Teachers Retirement System, 157 Ill.App.3d 573, 510 N.E.2d 1283 (1987); Moore vs. Sanitary District Trustees Annuity and Benefit Fund, 157 Ill.App.3d 158, 510 N.E.2d 87, 109 Ill.Dec. 466 (1987).

<sup>533</sup> 40 ILCS 5/3-147.

under the above statute by applying a “but for” test.<sup>534</sup> But for the fact that the police officer was a person of high rank, he would not have been put in a position or selected to participate in the crime.<sup>535</sup> Another court utilized a “substantial factor” test in finding a nexus between public service and the felony conviction.<sup>536</sup> In that case a Chicago alderman pleaded guilty to filing a false tax return. Although the crime required no proof relating to his official position, the court upheld the pension board’s termination of the pension benefits. The court concluded that the improper payments that led to the tax fraud were received because he was an alderman and was a substantial factor in the resulting tax conviction.<sup>537</sup> In determining whether or not a police officer’s pension benefits should be forfeited based upon a felony conviction relating to or arising out of service as a police officer, a pension board should apply both the “but for” and “substantial factor” test.

#### **1.     §10.13 REFUND OF CONTRIBUTIONS AFTER CONVICTION**

After a pension recipient has been convicted of a felony relating to or arising out of police service, there is an issue as to the officer’s right to a refund of his or her own contributions. In one case, a former police officer receiving a retirement pension pleaded guilty to extortion which occurred while he was working as a police officer. Thus, there was no issue here as to causal connection. When his pension was revoked by the pension board, he applied for a refund of his contributions. At the time of his refund request, the amount of retirement benefits he received exceeded his contributions by \$15,000.00. The pension board denied the refund request. On appeal, the pension board’s decision was affirmed. The court held that a pensioner whose retirement benefits are terminated due to a felony

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<sup>534</sup> Devoney vs. Retirement Board, 199 Ill.2d 414, 769 N.E.2d 932, 264 Ill.Dec. 95 (2002).

<sup>535</sup> Devoney, supra, 769 N.E.2d at 938.

<sup>536</sup> Bloom vs. Municipal Employees’ Annuity and Benefit Fund of Chicago, 339 Ill.App.3d 807, 791 N.E.2d 1254 (2003).

<sup>537</sup> Bloom, supra, 791 N.E.2d at 190.

conviction is entitled to a refund of pension contributions only to the extent that the contributions exceed the pension benefits received.<sup>538</sup>

The supreme court has addressed this issue and has rejected the rationale in the above case. It is now the law that the right to a refund of contributions is unconditional and there can be no deductions of the pension benefits paid from the beneficiary's contribution amounts.<sup>539</sup> It has also been held that a pension board cannot recoup pension benefits that were paid prior to the beneficiary's conviction.<sup>540</sup>

**G. §10.14 REDUCTION OF OVERPAYMENT OF BENEFITS DUE TO FRAUD, MISREPRESENTATION OR ERROR**

Frequently, pension boards discover that pension benefits are being overpaid. Such overpayments may stem from a number of reasons, usually miscalculation or clerical error, sometimes misrepresentation or fraud. The Pension Code addresses this situation:

The amount of any overpayment due to fraud, misrepresentation or error of any pension or benefit granted under this Article may be deducted from future payments to the recipient of such pension or benefit.<sup>541</sup>

In invoking the above language, a pension board must keep in mind that the pension recipient has a right to a hearing before any such benefits can be reduced.<sup>542</sup>

Pension boards have had mixed results in applying this provision in order to recoup pension overpayments. In one case, a pension board erroneously awarded a retirement pension based upon a mistaken belief that the police officer possessed sufficient creditable service for the retirement pension

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<sup>538</sup> Phelan vs. Village of LaGrane Park Police Pension Fund, 327 Ill.App.3d 527, 763 N.E.2d 343, 261 Ill.Dec. 373 (2001).

<sup>539</sup> Shields vs. Judges' Retirement System of Illinois, 204 Ill.2d 488, 791 N.E.2d 516, 274 Ill.Dec. 424 (2003); Bassett vs. Pekin Police Pension Board, 362 Ill.App.3d 235, 839 N.E.2d 130, 298 Ill.Dec. 143 (2005).

<sup>540</sup> Janata vs. Hillside Police Pension Fund, 140 Ill.App.3d 925, 489 N.E.2d 498, 95 Ill.Dec. 277 (1986).

<sup>541</sup> 40 ILCS 5/3-144.1.

<sup>542</sup> Peacock vs. South Chicago Heights Police Pension Board, 395 Ill.App.3d 644, 918 N.E.2d 243, 355 Ill.Dec. 189 (2009).

award. The appellate court ruled that the board could not change its decision.<sup>543</sup> In another case, a pension board awarded a disability pension in an amount the board determined to be the salary attached to rank on the last day the police officer worked. An advisory opinion issued by the Department of Insurance indicated that the salary determination was too high. The court held the pension board's decision did not constitute error under the Code and the board could not modify its previous decision.<sup>544</sup>

On the other hand, it has been held that a municipality's errors in calculating the annual cost of living increase the pensioner was to receive was not a final administrative decision and a downward adjustment in pension benefits due to errors in miscalculation of benefits was appropriate.<sup>545</sup>

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<sup>543</sup> Rossler vs. Morton Grove Police Pension Board, 178 Ill.App.3d 769, 533 N.E.2d 927, 127 Ill.Dec. 845 (1989).

<sup>544</sup> Kosakowski vs. Calumet City Police Pension Fund, 389 Ill.App.3d 381, 906 N.E.2d 689, 329 Ill.Dec. 191 (2009).

<sup>545</sup> Fields vs. Schaumburg Firefighters' Pension Board, 383 Ill.App.3d 209, 889 N.E.2d 1167, 321 Ill.Dec. 607 (2008).

## **CHAPTER 11**

### **TAXATION OF PENSION BENEFITS AND ANCILLIARY BENEFITS**

- A. §11.1 INTRODUCTION
- B. §11.2 APPLICABILITY OF ERISA TO POLICE PENSION FUNDS
- C. §11.3 APPLICABILITY OF THE INTERNAL REVENUE CODE TO POLICE PENSION FUNDS
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  - 3. §11.8 TAXATION OF RETIREMENT BENEFITS
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TO EMERGENT SITUATIONS OR  
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## CHAPTER 11

### **TAXATION OF PENSION BENEFITS AND ANCILLARY BENEFITS**

A. §11.1 **INTRODUCTION**

This Chapter initially deals with the applicability of federal taxation and pension laws to police pension funds in Illinois and the federal taxation of pension fund benefits. The secondary focus of this Chapter deals with certain benefits available to an injured police officer under two statutes related to

the Illinois Pension Code. These laws are the Public Employee Disability Act (PEDA)<sup>546</sup> and the Public Safety Employee Benefits Act (PSEBA).<sup>547</sup>

**B. §11.2 APPLICABILITY OF ERISA TO POLICE PENSION FUNDS**

The Employee Retirement Income Security Act (ERISA),<sup>548</sup> is the federal statute that governs pensions and pension benefits. A police officer's pension fund established under Article 3 of the Illinois Pension Code is defined as a governmental plan under ERISA and is exempt from most of the provisions of the federal pension law.<sup>549</sup> Thus, ERISA exempts Illinois public employee pension plans from the federal requirements dealing with participation, vesting, funding and fiduciary responsibilities. However, certain provisions of Title II of ERISA dealing with tax qualification do apply to pension funds created under the Illinois Pension Code.

**C. §11.3 APPLICABILITY OF THE INTERNAL REVENUE CODE TO POLICE PENSION FUNDS**

Illinois public employee pension funds are subject to the provisions of the Internal Revenue Code dealing with taxation.<sup>550</sup> Governmental or public pension plans achieve exempt tax status by satisfying the requirements of Section 401 (a) of the Internal Revenue Code.

Because governmental pension plans and the employing municipalities have tax exempt status, they do not benefit from the deductibility of employer contributions as do private companies that

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<sup>546</sup> 5 ILCS 345/0.01, et seq.

<sup>547</sup> 820 ILCS 320/10.

<sup>548</sup> 29 U.S.C. §1001, et seq.

<sup>549</sup> *In Re Marriage of Roehn*, 216 Ill.App.3d 891, 576 N.E.2d 560, 159 Ill.Dec. 891 (1991). The term "governmental plan" is defined in ERISA at 29 U.S.C. §1002(32).

<sup>550</sup> See 26 U.S.C. §401.

establish pension plans. However, qualification under the Internal Revenue Code is advantageous for a number of reasons:

- (A) The municipality's contributions are not currently taxable to the participant. Taxation is deferred until the police officer receives a distribution from the pension fund;
- (B) The investment income earned by the pension fund is exempt from current federal income tax.

Government plans are however subject to the contribution and benefit limitations contained in Section 415 of the Internal Revenue Code.<sup>551</sup>

#### **1. §11.4 GOVERNMENTAL REPORTING**

Public pension plans are not required to file Form 5500 with the federal government, which is the annual pension fund informational return for private sector pension plans subject to ERISA.<sup>552</sup> However, Illinois public employee pension plans should report lump sum or total distributions paid to participants on Form 1099R.

Governmental plans are also not subject to the participant disclosure requirements under ERISA. Thus, it is not necessary for a police officer's pension fund to prepare a summary plan description or furnish the same to pension fund participants. However, the police pension board may want to prepare and distribute to its participants and beneficiaries a description of benefits available under the Pension Code.

#### **D. §11.5 TAXATION OF PENSION BENEFITS UNDER ARTICLE 3**

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<sup>551</sup> 29 U.S.C. §415.

<sup>552</sup> 28 U.S.C. §401(a).

Pension benefits to participants under Article 3 of the Illinois Pension Code come in three basic forms: line-of-duty disability benefits,<sup>553</sup> not in duty disability benefits,<sup>554</sup> and retirement pension benefits.<sup>555</sup> Certain pension benefits are also paid to the survivors of police officers.<sup>556</sup> The federal income tax ramifications of these different pension benefits will vary, as is explained in the sections that follow.

#### **1. §11.6 TAXATION OF DUTY DISABILITY BENEFITS**

The Internal Revenue Code excludes from gross income, compensation for personal injuries or sickness under a workers' compensation act or a statute in the nature of a workers' compensation act.<sup>557</sup> Duty disability payments under §5-114.1 are made pursuant to a statute in the nature of a workers' compensation act and are not taxed as income.<sup>558</sup> The finding that the disability was incurred in the line of duty should be made at the time the disability pension is granted. The duty disability exclusion is not applicable to compensation paid to a disabled police officer or firefighter assigned to light duty.<sup>559</sup> Pension payments do not qualify for this exclusion unless the taxpayer can show that he or she was retired because of disability received in the line of duty, rather than for length of service or some other form of disability pension. There could also be tax consequences if the police officer continues to receive a non-taxable disability pension when he or she is eligible to receive a retirement pension.

#### **2. §11.7 TAXATION OF NON-DUTY**

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<sup>553</sup> 40 ILCS 5/4-114.1.

<sup>554</sup> 40 ILCS 5/3-114.2.

<sup>555</sup> 40 ILCS 5/3-111.

<sup>556</sup> 40 ILCS 5/3-112.

<sup>557</sup> 28 U.S.C. §104(a)(1); Reg. §1.104-1(b).

<sup>558</sup> Matter of Dwyer, 71 TC 560 (A)(1979); Rev. Ruling 8014 (1980).

<sup>559</sup> Rev. Ruling 80-137 (1980).

## **DISABILITY BENEFITS**

Non-duty disability benefits under 40 ILCS 5/3-114.2 of the Pension Code are taxable as income since such benefits do not constitute amounts received under a statute in the nature of a workers' compensation award and do not result from injury incurred in the line of duty.<sup>560</sup>

### **3. §11.8 TAXATION OF RETIREMENT BENEFITS**

Retirement pension benefits<sup>561</sup> are taxed as income when such benefits are received, unless the police officer's contributions were taxed at the time such contributions were made. Duty disability benefits that are converted to a retirement pension are includable in gross income and thus subject to income tax.<sup>562</sup>

### **4. §11.9 TAXATION OF SURVIVORSHIP BENEFITS**

Survivorship benefits for death in the line of duty would also be non-taxable. If a disabled police officer dies prior to converting a duty disability pension to a retirement pension, the benefits are still excludable from taxation when paid to the surviving spouse.

## **E. §8.10 TAXATION OF CONTRIBUTIONS**

Under Article 3, police officers are required to contribute 9.1% of their salary towards the cost of pension benefits.<sup>563</sup> These payments are considered a part of income and are subject to income taxation. As is shown in the next section, there is a procedure whereby these contributions can be non-taxable.

### **1. §11.11 PICK-UP OF CONTRIBUTIONS**

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<sup>560</sup> Rev. Ruling 79-147 (1979).

<sup>561</sup> 40 ILCS 5/3-111.

<sup>562</sup> Rev. Ruling 8014 (1980).

<sup>563</sup> 40 ILCS 5/3-125.1.

The municipality can “pick up” the contributions of the police officers required under §3-125.1. If the police officer’s contributions are picked up by the municipality, the contributions are treated as employer contributions and are not taxable as income to the police officers.<sup>564</sup> The municipality may pick up these contributions by reducing the salary of the police officer or by a reduction in the future salary of the police officer or a combination of these methods. However, a reduction in salary is not mandatory.

In order to obtain this non-taxable status, the municipality or the pension fund must obtain a ruling from the Internal Revenue Service that the contributions shall be excluded from the gross income of the police officers under Section 414 (h)<sup>565</sup> of the Internal Revenue Code. The suggested procedure to be used in establishing tax-exempt status under the pick up contribution statute is as follows:

- (A) The pension board must vote to establish a pick-up contribution program;
- (B) The participants of the pension fund should sign a declaration approving the establishment of such a program;
- (C) The municipality must agree to the establishment of the program and a municipal resolution must be passed;
- (D) The municipality or the pension board must then obtain a ruling under §414 (h) from the Internal Revenue Service that the pick-up contributions are exempted from taxation as gross income under §401 (a) of the Internal Revenue Service.

The municipality must continue to withhold federal and state income taxes until the Internal Revenue Service issues its §414 (h) ruling.

#### **F. §11.12 TAXATION OF PENSION FUND WITHDRAWALS**

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<sup>564</sup> 40 ILCS 5/3-125.1.

<sup>565</sup> 26 U.S.C. §414(h).

Federal law<sup>566</sup> requires that any member of a public or private pension fund who receives a refund of contributions upon termination of his or her employment, is subject to a 20% withholding on the taxable portion of the refund. However, the 20% withholding can be avoided if the withdrawing employee elects to have the taxable portion of the refund transferred to another public pension fund qualified to receive a transfer under the Illinois Pension Code or to an Independent Retirement Account. (IRA). The pension fund must provide the participant with the option of having the participant's taxable lump sum distribution transferred directly to a qualified plan or to an IRA. Trustees should be aware that under Article 3, pension funds of a police officer can only be transferred to certain specified public employee funds.

Under the Illinois Pension Code and applicable federal income tax law, pension fund participants may have some pension contributions that have already been taxed and some contributions that have not been taxed. These "pre-tax" contributions would be the contributions that the municipality has "picked-up" under the Pension Code<sup>567</sup> and the Internal Revenue Code.<sup>568</sup> A formula is used to determine the taxable portion.

#### **G. §11.13 NON-ALIENATION OF BENEFITS**

Article 3 of the Pension Code provides that pension benefits are exempt from garnishment, attachment, assignment or levy on account of any debts, judgments, court orders or damage awards that may have been entered against the police officer.<sup>569</sup> Thus, these benefits are for the exclusive payment

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<sup>566</sup> 26 U.S.C. §3405(e).

<sup>567</sup> 40 ILCS 5/3-125.2.

<sup>568</sup> 26 U.S.C. §414(h)(2).

<sup>569</sup> 40 ILCS 5/3-144.1.

to participants and beneficiaries and the pension board cannot be forced to pay these benefits to any creditors.<sup>570</sup>

There are some statutory exceptions to this non-alienation provision. First, Illinois public pension funds are now subject to QILDRO proceedings.<sup>571</sup> Second, the Marriage and Dissolution of Marriage Act provides that orders for support in a divorce proceeding may be satisfied from pension benefits.<sup>572</sup>

#### **H. §11.14 PUBLIC EMPLOYEE DISABILITY ACT**

Closely connected to the line-of-duty disability provision under Article 3 of the Pension Code is the Public Employee Disability Act (PEDA).<sup>573</sup> That act provides in pertinent part:

(b) Whenever an eligible employee suffers any injury in the line of duty which causes him to be unable to perform his duties, he shall continue to be paid by the employing public entity on the same basis as he was paid before the injury, with no deduction from his sick leave credits, compensatory time for overtime accumulations or vacation, or service credits in a public employee pension fund during the time he is unable to perform his duties due to the result of the injury, but not longer than one year in relation to the same injury.<sup>574</sup>

These benefits are paid by the municipality, not by the pension board. An award of PEDA benefits can save a pension board money, as a police officer receiving PEDA benefits cannot receive a disability pension until the PEDA benefits are exhausted. A police officer receiving PEDA benefits cannot be employed in any other capacity.<sup>575</sup>

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<sup>570</sup> See, In re Marriage of Johnston, 206 Ill.App.3d 262, 562 N.E.2d 1004, 150 Ill. Dec. 201 (1990).

<sup>571</sup> 40 ILCS 5/1-119. QILDROs are discussed in Chapter 12.

<sup>572</sup> 750 ILCS 5/706.1.

<sup>573</sup> 5 ILCS 345/0.01 *et seq.*

<sup>574</sup> 5 ILCS 345/1(b).

<sup>575</sup> 5 ILCS 345/1(d).

One case has held that the definition of “line of duty” under PEDA is the same under the Workers’ Compensation Act, which requires that the injury “arose out of and in the course of employment.”<sup>576</sup>

It has also been held that PEDA recipient is entitled to one full year of PEDA benefits.<sup>577</sup> In that case, a firefighter injured in the line of duty applied for and received PEDA benefits for six months. He returned to work and was re-injured. He again applied for PEDA benefits which the employer denied. The appellate court ruled that the applicant was entitled to receive PEDA benefits for the remaining six months.

#### I. **§11.15 PUBLIC SAFETY EMPLOYEE BENEFITS ACT**

Also related to the duty disability provision contained in Article 3 is the Public Safety Employee Benefits Act (PSEBA).<sup>578</sup> That act requires the municipality to pay insurance coverage for the injured police officer and his family, provided certain conditions are met. The statutes provides in pertinent part:

- a) An employer who employs a full-time law enforcement, correctional or correctional probation officer, or firefighter, who... suffers a catastrophic injury or is killed in the line of duty shall pay the entire premium of the employer's health insurance plan for the injured employee, the injured employee's spouse, and for each dependent child of the injured employee until the child reaches the age of majority or until the end of the calendar year in which the child reaches the age of 25 if the child continues to be dependent for support or the child is a full-time or part-time student and is dependent for support...If the injured employee subsequently dies, the employer shall continue to pay the entire health insurance premium for the surviving spouse until remarried and for the dependent children under the conditions established in this Section...
- (b) In order for the law enforcement, correctional or correctional probation officer, firefighter, spouse, or dependent children to be eligible for

<sup>576</sup> Mabie vs. Village of Schaumburg, 364 Ill.App.3d 756, 847 N.E.2d 796, 301 Ill.Dec. 786 (2006).

<sup>577</sup> Bahr vs. Bartlett Fire Protection District, 383 Ill.App.3d 68, 889 N.E.2d 706, 321 Ill.Dec. 495 (2008).

<sup>578</sup> 820 ILCS 320/10.

insurance coverage under this Act, the injury or death must have occurred as the result of the officer's response to fresh pursuit, the officer or firefighter's response to what is reasonably believed to be an emergency, an unlawful act perpetrated by another, or during the investigation of a criminal act.<sup>579</sup>

Once again, this is an expense that is borne by the municipality, not the pension fund. The two conditions that must be met in order to be eligible for this benefit are discussed in the sections that follow.

#### **1. §11.16 CATASTROPHIC INJURY REQUIREMENT**

In order to be eligible for PSEBA benefits, the police officer must be killed in the line of duty or suffer a catastrophic injury. The term "catastrophic injury" is not defined under PSEBA, but the courts have held that a catastrophic injury means an injury entitling a police officer or firefighter to receive a line-of-duty disability pension.<sup>580</sup> Thus, before an individual can apply for these benefits, he or she must first apply for and be awarded a line-of-duty disability pension by the pension board.

#### **1. §11.17 INVESTIGATION OR RESPONSE TO EMERGENCY SITUATIONS OR UNLAWFUL ACTS**

The statute also states that in order to be eligible for insurance coverage under the Act, the injury or death must have occurred as a result of the officer's response to: (1) fresh pursuit; (2) what is reasonably believed to be an emergency; (3) an unlawful act; (4) the investigation of a criminal act.<sup>581</sup> Thus, there can be instances where a police officer receives a duty disability pension, but is not eligible for coverage under PSEBA. An award of a line-of-duty disability pension does not guarantee that the

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<sup>579</sup> 820 ILCS 320/10(a), (b).

<sup>580</sup> Krohe vs. City of Bloomington, 204 Ill.2d 392, 789 N.E.2d 1211, 273 Ill.Dec. 779 (2003); O'Loughlin vs. Village of River Forest, 338 Ill.App.3d 189, 788 N.E.2d 157, 272 Ill.Dec. 853 (2003).

<sup>581</sup> 820 ILCS 320/10(b).

officer will receive benefits under the Act. The case law is still developing as to what acts of police duty will qualify a police officer or his family for benefits under PSEBA.

The first case to address this issue held that a police officer parked on the side of a highway monitoring traffic when he was hit by another car from behind was entitled to PSEBA benefits.<sup>582</sup> In another case it was held that an officer who was injured when he slipped and fell while investigating a burglary call was entitled to benefits under the Act.<sup>583</sup> The court in that case reasoned that a situation is an emergency under the Act where it is urgent and calls for immediate action. In this case the court found that it was reasonable for the police officer to believe he was responding to an emergency.

There is a split of authority regarding coverage under PSEBA when an individual was injured during a training exercise. One case has held that the training exercise did not rise to the level of an emergency,<sup>584</sup> while another case involving the same employer held that the training exercise did involve an emergency situation.<sup>585</sup>

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<sup>582</sup> Senese vs. Village of Buffalo Grove, 383 Ill.App.3d 276, 890 N.E.2d 628, 321 Ill.Dec. 906 (2008).

<sup>583</sup> DeRose vs. City of Highland Park, 386 Ill.App.3d 658, 898 N.E.2d 1115, 325 Ill.Dec. 836 (2008).

<sup>584</sup> Gaffney vs. Orland Fire Protection District, 397 Ill.App.3d 679, 921 N.E.2d 778, 336 Ill.Dec. 922 (2010).

<sup>585</sup> Lemmenes vs. Orland Fire Protection District, 399 Ill.App.3d 644, 927 N.E.2d 783, 340 Ill.Dec. 44 (2010).

## **CHAPTER 12**

### **QILDRO PROCEEDINGS**

- A. §12.1 INTRODUCTION
- B. §12.2 CONSEQUENCES OF DIVORCE ON PENSION BENEFITS
- C. §12.3 QILDROS V. QDROS
- D. §12.4 WHAT BENEFITS APPLY TO QILDROS
- E. §12.5 QILDRO CALCULATION ORDERS
- F. §12.6 QILDRO CONSENT REQUIREMENT
- G. §12.7 QILDRO PREPARATION CONSIDERATIONS
  - 1. §12.8 QILDRO CONTENTS
  - 2. §12.9 PARTY RESPONSIBILITIES
    - a. §12.10 QILDRO CALCULATION ORDER RESPONSIBILITIES
- H. §12.11 QILDRO TIMELINE

## **CHAPTER 12**

### **QILDRO PROCEEDINGS**

- A. **§12.1 INTRODUCTION**

“QILDRO” is an acronym for Qualified Illinois Domestic Relations Order. A QILDRO is a court order issued within the State of Illinois that directs an Illinois public retirement system to pay an alternate payee a portion of a pension fund member’s<sup>586</sup> retirement benefit, certain refunds or lump sum death benefits.<sup>587</sup> An alternate payee is typically an ex-spouse, but it may also be a current spouse, child or other dependent.<sup>588</sup>

#### **B. §12.2        EFFECT OF DIVORCE ON PENSION BENEFITS**

A police officer’s pension benefits from the pension fund are a form of deferred compensation and considered to be marital property.<sup>589</sup> A police officer’s beneficial pension interest acquired during marriage is subject to distribution when the marriage is dissolved.<sup>590</sup> However, the method for dividing such pension benefits is determined by the Pension Code, not the Illinois Marriage Act.<sup>591</sup>

The Pension Code provides that pensions granted under Article 3 are exempt from attachment or garnishment and cannot be taken or levied upon by virtue of any judgment or court proceeding.<sup>592</sup> However, there are two statutory exceptions to this non-alienation provision. First, Illinois public pension fund are now subject to QILDRO proceedings.<sup>593</sup> Second, the Marriage and Dissolution Act provides that orders for support in a divorce proceeding may be satisfied from pension benefits.<sup>594</sup>

#### **B. §12.2        QILDROS V. QDROS**

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<sup>586</sup> 40 ILCS 5/1-119(a)(4).

<sup>587</sup> 40 ILCS 5/1-119(a)(6).

<sup>588</sup> 40 ILCS 5/1-119(a)(1).

<sup>589</sup> In re Marriage of Hackett, 113 Ill.2d 286, 497 N.E.2d 1152, 100 Ill.Dec. 790 (1986).

<sup>590</sup> In re Marriage of Papeck, 95 Ill.App.3d 624, 420 N.E.2d 528, 51 Ill.Dec. 114 (1981).

<sup>591</sup> In re Marriage of Hannon, 207 Ill.App.3d 329, 565 N.E.2d 1016, 152 Ill.Dec. 334 (1991).

<sup>592</sup> 40 ILCS 5/3-114.1

<sup>593</sup> 40 ILCS 5/3-119.

<sup>594</sup> 750 ILCS 5/706.1.

QILDROS are created under the law to solely apply to pension benefits delineated under the Illinois Pension Code. In a typical dissolution of marriage setting, parties to a divorce utilize a QDRO, or Qualified Domestic Relations Order, to equitably distribute the parties' assets. However, public pension benefits under the Illinois Pension Code must be divided pursuant to a QILDRO, not a QDRO.

The Illinois Marriage and Dissolution Act specifically references this fact. The Act provides as follows:

“For purposes of distribution of property...all pension benefits (including pension benefits under the Illinois Pension Code) acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage are presumed to be marital property....The right to a division of pension benefits in just portions under this Section is enforceable under Section 1-119 of the Illinois Pension Code.”<sup>595</sup>

Knowing that pension benefits are to be divided pursuant to a QILDRO as opposed to a QDRO is a very important consideration to keep in mind as many family law attorneys are unfamiliar with QILDROS and may approach a pension fund with a proposed QDRO. Pension Boards are often served with a Qualified Domestic Relations Order (QDRO), arising out of a police officer's divorce proceedings.<sup>596</sup> The purpose of a QDRO is to require a pension fund to hold or turn over pension funds pursuant to a divorce court order. The QDRO provisions are a part of ERISA, but since Illinois public pension funds are exempt from most ERISA provisions, the QDRO procedures do not apply to a police pension fund established under Article 3 of the Illinois Pension Code.<sup>597</sup> If, however, a pension fund agrees to honor a QDRO, the fund will be required to continue the pension disbursements directly to

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<sup>595</sup> 750 ILCS 5/503(b)(2).

<sup>596</sup> See, In re Marriage of Roehn, 216 Ill.App.3d 891, 576 N.E.2d 560, 159 Ill.Dec. 891 (1991).

<sup>597</sup> In re Marriage of Roehn, supra; In re marriage of Johnson, 206 Ill.App.3d 262, 562 N.E.2d 1004, 150 Ill.Dec. 201 (1990).

the divorced spouse.<sup>598</sup> Because QDROs are inapplicable to Article 3 pensions, it is helpful to be able to notice this difference at the outset.

**D. §12.4 WHAT BENEFITS APPLY TO QILDROS**

Not all pension benefits under Article 3 of the Pension Code are applicable for division in a divorce proceeding. The following benefits may be divided under a QILDRO:

- 1) Retirement benefits;
- 2) Refunds (separation/partial).

The parties to a dissolution of marriage ultimately are who decide whether or not a participant's pension benefits are to be divided. A Pension Fund has nothing to do with this decision. Likewise the manner or method of division is entirely up to what the parties agree to or what the court orders.

The following benefits may never be divided pursuant to the terms of a QILDRO:

- 1) Survivor's benefits;
- 2) Disability benefits;
- 3) Life insurance benefits;
- 4) Health insurance benefits.<sup>599</sup>

**E. §12.5 QILDRO CALCULATION ORDERS**

In instances in which a QILDRO indicates that the alternate payee is to receive a percentage of a pension benefit, the parties will also be required to file an additional document called a QILDRO Calculation Order. A QILDRO Calculation Order is essentially a mathematical worksheet that delineates the amount of a participant's pension benefit that is to be awarded to the alternate payee, i.e. the ex-spouse.<sup>600</sup>

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<sup>598</sup> *In re Marriage of Carlson*, 269 Ill.App.3d 464, 646 N.E.2d 321, 206 Ill.Dec. 954 (1995).

<sup>599</sup> 40 ILCS 5/1-119(b)(4).

<sup>600</sup> 40 ILCS 5/1-119(c)(5).

Just as with the actual QILDRO, a QILDRO Calculation Order will be filed with the circuit court in which the parties' divorce proceedings were filed.<sup>601</sup> Whether the QILDRO Calculation Order is filed simultaneously with the actual QILDRO will depend heavily upon whether the active pension participant, or regular payee, is at or near retirement. Because a QILDRO Calculation Order is essentially a mathematical equation based upon a member's years of service and pension amount, it sometimes is difficult to ascertain these necessary figures if a member is not near retirement. In such instances, the parties may wish to forego filing a QILDRO Calculation Order until a later date, which may in fact be years down the road, when the figures necessary to calculate an alternate payee's pension amount are ascertainable.

Once a QILDRO Calculation Order has been filed, a certified copy must be sent to and received by the Pension Fund before fund will begin to pay out benefits.<sup>602</sup> A processing fee of \$50.00 made payable to the pension fund must accompany each QILDRO or QILDRO Calculation Order filed with the Board.<sup>603</sup>

#### F. **§12.6 QILDRO CONSENT REQUIREMENT**

If a pension fund member's participation date was before July 1, 1999 a QILDRO will only be valid if the member consents to it in writing.<sup>604</sup> However the mere fact that a regular payee refuses to sign a QILDRO Consent does not ultimately preclude an alternate payee from seeking division of that person's pension benefits. As previously stated, pension benefits are in considered marital property, and the failure or refusal to sign a QILDRO Consent does not in itself preclude a court from ordering

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<sup>601</sup> *Id.*

<sup>602</sup> 40 ILCS 5/1-119(d)(1).

<sup>603</sup> 40 ILCS 5/1-119(d)(3).

<sup>604</sup> 40 ILCS 5/1-119(m)(1).

division of that asset. The pension may still be subject to division, however this just may not be through facilitation by the pension fund.

The signing of a QILDRO consent form is voluntary. A court cannot order a police officer to sign a QILDRO consent.<sup>605</sup>

#### **G. §12.7 QILDRO PREPARATION CONSIDERATIONS**

The pension board does not prepare a QILDRO order for parties to a divorce proceeding, nor is a pension board obligated to supply a QILDRO order to the police officer or his spouse. A sample QILDRO is set out in the Pension Code.

#### **1. §12.8 QILDRO CONTENTS**

The following is a list of information that a QILDRO must contain:

- 1) Member's name;<sup>606</sup>
- 2) Member's mailing address;<sup>607</sup>
- 3) Member's social security number;<sup>608</sup>
- 4) Alternate payee's social security number;<sup>609</sup>
- 5) Identification of the retirement system to which QILDRO is directed;<sup>610</sup>
- 6) Identification of court issuing the order;<sup>611</sup>
- 7) Statement specifying each benefit to which QILDRO applies;<sup>612</sup>

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<sup>605</sup> In re Marriage of Menken, 334 Ill.App.3d 531, 778 N.E.2d 281, 268 Ill.Dec. 295 (2002).

<sup>606</sup> 40 ILCS 5/1-119(c)(1).

<sup>607</sup> *Id.*

<sup>608</sup> *Id.*

<sup>609</sup> *Id.*

<sup>610</sup> *Id.*

<sup>611</sup> *Id.*

- 8) Statement specifying amount of the benefit to be paid;<sup>613</sup>
- 9) Date of when order will take effect with regard to each benefit to be paid;<sup>614</sup>
- 10) Provisions required under 40 ILCS 5/1-119(n)&(p).<sup>615</sup>

Items 7-9 above are considered the “meat and potatoes” of the QILDRO. These items essentially delineate the type of pension benefit that is to be divided and the amount or portion.

## **2. §12.9 PARTY RESPONSIBILITIES**

As indicated above, typically the parties to a QILDRO are the regular payee, or the active pension fund participant and the alternate payee, the other party to the divorce proceeding. Essentially, these individuals (and/or their attorneys) are responsible for preparing the QILDRO and QILDRO Calculation Order (if applicable),<sup>616</sup> making all of the necessary QILDRO calculations,<sup>617</sup> maintaining up to date contact information with the Pension Fund,<sup>618</sup> appearing before the Court and having the Order(s) entered, and finally filing a certified copy of all Orders with the Pension Fund along with a nonrefundable \$50 processing fee made payable to the pension fund.<sup>619</sup>

In return, all an Article 3 Pension Fund is essentially required to do is provide the parties to a dissolution of marriage proceeding with the information necessary to prepare and file a QILDRO and

<sup>612</sup> 40 ILCS 5/1-119(c)(2).

<sup>613</sup> *Id.*

<sup>614</sup> 40 ILCS 5/1-119(c)(3).

<sup>615</sup> 40 ILCS 5/1-119(C)(4). Subsection 119(n) is a form QILDRO and subsection 119(p) allows for a retirement system to adopt rules and procedures relating to the implementation of this portion of the Pension Code.

<sup>616</sup> 40 ILCS 5/1-119(c)(5)-(c)(6).

<sup>617</sup> *Id.*

<sup>618</sup> 40 ILCS 5/1-119(e)(1).

<sup>619</sup> 40 ILCS 5/1-119(d)(1), 40 ILCS 5/1-119(d)(3).

QILDRO Calculation Order. The pension fund has no duty or obligation to assist in the preparation or completion of a QILDRO.<sup>620</sup> This information may include the following:

- (a) Fund's contact information;
- (b) Member's date of initial membership (m/d/y);
- (c) Amount of regular & permissive service (as of most recent date available);
- (d) Member's accumulated contributions, accrued benefits, other interests in plan, and/or gross amount of benefit earned;
- (e) Earliest date member may be eligible to receive the benefit;
- (f) Gross amount of refund/partial refund;
- (g) Whether participant has notified fund as to intended date of retirement;
- (h) Effective date of retirement, amount of commenced benefit;
- (i) Fund's procedures for implementing QILDRO;<sup>621</sup>

This information may be requested through the issuance of a subpoena,<sup>622</sup> however a Pension Fund is not precluded from providing this information in response to a more informal request (i.e. written request).

**a. §12.10 QILDRO CALCULATION ORDER  
RESPONSIBILITIES**

The preparation of a QILRO Calculation Orders, as well as the calculations that are contained in such orders, shall be performed either by the member, alternate payee, or their designated

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<sup>620</sup> 40 ILCS 5/1-119(c)(5).

<sup>621</sup> 40 ILCS 5/1-119(h)(1)-(h)(1.5).

<sup>622</sup> 40 ILCS 5/1-119(h)(1).

representatives/experts.<sup>623</sup> An Article 3 or Article 4 Pension Fund has absolutely no duty or obligation to assist in such calculations or help to complete the QILDRO Calculation Order.<sup>624</sup> Likewise, neither is a pension fund obligated to make any determinations as to whether the calculations are accurate or in accordance with the parties' QILDRO, agreement or judgment.<sup>625</sup> However, a pension fund cannot reject a QILDRO based upon inaccuracies, but it will likewise not be held responsible for any inaccuracies made in the calculations.<sup>626</sup>

#### **H. §12.11QILDRO TIMELINE**

Because a QILDRO is a court order, it typically is deemed to take effect upon its entry by the circuit court that retains jurisdiction over the dissolution of marriage proceeding and filing of a certified copy before the pension fund.<sup>627</sup> However, it is important to keep in mind that payments will not commence until the pension participant seeks some form of payment of his or her pension. Even if a valid QILDRO is on file, payment cannot be accelerated to pay a former spouse before the member is paid. An alternate payee will only receive payment if and when the pension fund member receives payment.<sup>628</sup> In other words, the pension fund member must apply for and receive a benefit before any payment can be made to an alternate payee.<sup>629</sup>

As with any other pension benefit, QILDROS are not perpetual in nature. Rather, a QILDRO will eventually cease to be effective. A QILDRO may contain a defined period amount and terminate

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<sup>623</sup> 40 ILCS 5/1-119(c)(6).

<sup>624</sup> *Id.*

<sup>625</sup> *Id.*; 40 ILCS 5/1-119(d)(2).

<sup>626</sup> 40 ILS 5/1-119(c)(6).

<sup>627</sup> 40 ILCS 5/1-119(d)(1).

<sup>628</sup> See 40 ILCS 5/1-119(b)(2)-(b)(3).

<sup>629</sup> *Id.*

after a specified number of payments. The QILDRO may also provide for termination upon the death of either party to the order.<sup>630</sup> In addition, should the pension participant seek a complete refund of benefits, thereby terminating his or her participation in the retirement system, a pension fund will no longer be obligated to pay out benefits to the alternate payee. Finally, due to the fact that a QILDRO is simply a specific type of court order, it may be terminated by subsequent court order.

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<sup>630</sup> 40 ILCS 5/1-119(g)(1).

## **CHAPTER 13**

### **THE OPEN MEETINGS ACT**

- A. §13.1 INTRODUCTION
- 1. §13.2 PURPOSE
- B. §13.3 DEFINITIONS
- 1. §13.4 PUBLIC BODY
- 2. §13.5 MEETING
- 3. §13.6 QUORUM
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- E. §13.13 FINAL ACTION
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- K. §13.20 CLOSED MEETINGS
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## **CHAPTER 13**

### **THE OPEN MEETINGS ACT**

**A.           §13.1        INTRODUCTION**

In addition to being familiar with the provisions of various sections of the Illinois Pension Code, police pension trustees must also be aware of the Open Meetings Act.<sup>631</sup> This law ensures the public's right to know how administrative bodies, such as public pension boards conduct their business.

**1.        §13.2        PURPOSE**

The purpose of the Open Meetings Act ("OMA") is to ensure that the actions of public bodies are conducted openly in order for Illinois citizens to be aware of what public business is transacted.<sup>632</sup> Exceptions to the public's right to attend governmental meetings exist only in limited circumstances where the public interest would clearly be endangered or where there would be an invasion of personal privacy. Exceptions to the Open Meetings Act are strictly construed against closed meetings.<sup>633</sup>

**B.        §13.3        DEFINITIONS**

The key to understanding any piece of legislation starts with a review and understanding of the statute's definitions. The OMA contains a number of important definitions, which are discussed in the sections that follow.

**1.        §13.4        PUBLIC BODY**

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<sup>631</sup> 5 ILCS 120/1, et seq.

<sup>632</sup> 5 ILCS 120/1.

<sup>633</sup> *Id.*

The term “public body” includes all legislative, executive, administrative and advisory bodies of all branches of State and local government. This definition would specifically include public pension boards.<sup>634</sup>

**2. §13.5 MEETING**

“Meeting” means any gathering in person, by video or audio conference, telephone or by electronic means of a majority of a quorum of a public body held for the purpose of discussing public business.<sup>635</sup> In our present era of electronic communications, pension board trustees must be careful as to what is transmitted via e-mail to other trustees because such transmissions may constitute a “meeting” that violates the OMA.

**3. §13.6 QUORUM**

Under the OMA, a quorum means a majority of the members of a public body. For a five member public body, such as police and firefighter pension boards, three members of the body constitute a quorum and the affirmative vote of three members is necessary to adopt any resolution unless a greater majority is otherwise required.<sup>636</sup> Thus, if only three trustees attend a pension board meeting, all three must vote in the affirmative to pass any board business.

**D. §13.7 DISCUSSION OF PUBLIC BUSINESS**

If there is an intent to discuss public business, then no matter where a majority of the quorum meets, the OMA applies and the meeting must comply with the requirements of the Act.

**E. §13.8 EXCEPTIONS TO OPEN MEETINGS**

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<sup>634</sup> 5 ILCS 120/1.02.

<sup>635</sup> *Id.*

<sup>636</sup> *Id.*

All meetings of public bodies, including pension board meetings, must be open to the public unless the meeting falls within one of the exceptions that allow for closed meetings. Under the OMA, there are currently twenty-five (25) exceptions under which a public meeting may be closed.<sup>637</sup> These exceptions are strictly construed. The exceptions authorize, but do not require, holding a closed meeting. Thus, even though an exception may be applicable, a pension board can elect to consider the matter in an open meeting.<sup>638</sup> The following OMA exceptions may have application to pension board proceedings.

**1.     §13.9         INVESTMENT DECISIONS**

The sale or purchase of securities, investments or investment contracts may be decided in a closed meeting.<sup>639</sup>

**2.     §13.10EMPLOYMENT DECISIONS**

The employment, appointment, compensation or discipline of employees of a pension board of the board's legal counsel may be dealt with in a closed meeting.<sup>640</sup>

**3.     §13.11PENSION BOARD ADJUDICATIONS**

The adjudication of evidence or testimony presented in an open hearing can be handled in executive session, provided that the public body prepares and makes available a written decision setting forth its definitive reasoning. Thus, in deciding pension applications, a pension board may adjourn into executive session, take the matter under advisement, and issue a written decision.<sup>641</sup>

**\$..     §13.12PENDING OR IMMINENT LITIGATION**

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<sup>637</sup> 5 ILCS 120/2(c).

<sup>638</sup> 5 ILCS 120/2(b).

<sup>639</sup> 5 ILCS 120/2(c)(7).

<sup>640</sup> 5 ILCS 120/2(c)(4).

<sup>641</sup> Calibraro vs. Buffalo Grove Firemen's Pension Fund, 367 Ill.App.3d 259, 854 N.E.2d 787, 305 Ill.Dec. 195 (2006).

A board may adjourn into closed session to discuss litigation pending either in a court of law or an administrative proceeding before another governmental agency, such as the Illinois Department of Insurance.<sup>642</sup> A public body may also go into executive session where legal action is probable or imminent, in which case, the basis of the finding should be recorded and entered into the minutes.<sup>643</sup>

**E.           §13.13FINAL ACTION**

No final action may be taken at a closed meeting.<sup>644</sup> Final action shall be preceded by a public recital of the nature of the matter being decided. However, when dealing with adjudications, such as pension applications, final action can be in the form of a written order.

**F.           §13.14TIME AND PLACE OF MEETINGS**

All public meetings must be held at specified times and places which are convenient and open to the public.<sup>645</sup> No meeting shall be held on a legal holiday unless the regular meeting falls on that holiday.

**G.           §13.15PHYSICAL PRESENCE**

A quorum of members of a public body must be physically present at the location of an open meeting.<sup>646</sup>

**H.           §13.16PUBLIC NOTICE**

A pension board must give notice of the schedule of regular meetings at the beginning of each calendar year.<sup>647</sup> The notice shall state the time, date and place of such meeting. Public notice is given

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<sup>642</sup> 5 ILCS 120/2(c)(4).

<sup>643</sup> People ex rel. Hopf vs. Barger 30 Ill.App.3d 525, 332 N.E.2d 649 (1975).

<sup>644</sup> 5 ILCS 120/2(e).

<sup>645</sup> 5 ILCS 120/2.01.

<sup>646</sup> *Id.*

by posting a copy of the notice at the principal office of the public body holding the meeting. If no such office exists, then the public notice should be posted where the meeting is to be held.<sup>648</sup> Public notice of any special meeting shall be given at least 48 hours before such meeting. Notice of any emergency meeting shall be given as soon as practicable, but in any event prior to the holding of the meeting.<sup>649</sup>

**I.           §13.17AGENDAS**

An agenda for each regularly scheduled meeting shall be posted at the pension board's principal office and where the meeting is to be held at least 48 hours prior to the meeting.<sup>650</sup>

**J.           §13.18MINUTES**

All public bodies under the OMA must keep written minutes of all meetings, whether open or closed.<sup>651</sup> Minutes must include the following:

- (1) date, time and place of the meeting;
- (2) members recorded as either present or absent;
- (3) summary of discussion on all matters proposed, deliberated or decided;
- (4) record of any votes taken.<sup>652</sup>

A public body must meet at least semi-annually to review minutes of all closed session meetings.<sup>653</sup> At such time, the public body must make a determination if the closed session minutes no

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<sup>647</sup> 5 ILCS 120/2.02(a).

<sup>648</sup> 5 ILCS 120/2.02(b).

<sup>649</sup> 5 ILCS 120/2.02(a).

<sup>650</sup> *Id.*

<sup>651</sup> 5 ILCS 120/2.06.

<sup>652</sup> *Id.*

<sup>653</sup> 5 ILCS 120/2.06(d).

longer require confidential treatment. Minutes of closed session meetings shall only be made available to the public body after the public body determines that confidentiality is no longer necessary.<sup>654</sup>

**1. §13.19VERBATIM RECORDATION**

In addition to keeping minutes of closed session meetings, a verbatim record of all closed meetings in the form of an audio or video recording is required. It is suggested that a court reporter be used to record closed session meetings as well. That way, it is easier to identify who is speaking.

**K. §13.20CLOSED MEETINGS**

A pension board may move into closed session upon a majority vote of a quorum present.<sup>655</sup> The vote of each member present and the exception allowing closure must be publicly disclosed at the time of the vote. Nothing in the OMA requires that a meeting be closed to the public.

**L. §13.21JUDICIAL ACTION FOR NONCOMPLIANCE**

When the OMA is not complied with, or where there is probable cause to believe that the Act will not be complied with, any person may bring civil action in the circuit court.<sup>656</sup> The States Attorney of the county where the alleged noncompliance has occurred may also file suit. Civil action must be brought within 60 days of the meeting in which the violation occurred.<sup>657</sup>

**1. §13.22IN CAMERA INSPECTION**

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<sup>654</sup> 5 ILCS 120/2.06(f).

<sup>655</sup> 5 ILCS 120/2a.

<sup>656</sup> 5 ILCS 120/3(a).

<sup>657</sup> *Id.*

In determining whether a violation of the OMA has occurred, a court may make an in camera examination of any portion of the minutes of a meeting at which a violation of the Act is alleged to have occurred.<sup>658</sup>

**M.            §13.23 JUDICIAL REMEDIES**

A court may grant any relief that it deems appropriate, including injunctive relief or a writ of mandamus requiring that a meeting be open to the public.<sup>659</sup> A court may also declare null and void any final action taken by a public body in violation of the act.

The court may assess against any party, except the States Attorney, reasonable attorney's fees and litigation costs incurred by any party who substantially prevails in any action brought under the OMA.<sup>660</sup> Fees and costs can only be assessed against a private party, if the court finds that the lawsuit was malicious or frivolous.<sup>661</sup>

**N.            §13.24 CRIMINAL VIOLATIONS**

Any person violating any of the provisions of the OMA may be guilty of a Class C misdemeanor.<sup>662</sup>

**O.            §13.25 PUBLIC ACCESS COUNSELOR**

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<sup>658</sup> 5 ILCS 120/3(b).

<sup>659</sup> 5 ILCS 120/3(c).

<sup>660</sup> 5 ILCS 120/3(d).

<sup>661</sup> *Id.*

<sup>662</sup> 5 ILCS 120/4.

A person who believes that a violation of the OMA has occurred may also file a request for review with the Public Access Counselor of the Attorney General's Office within sixty (60) days of the alleged violation.<sup>663</sup>

**P.           §13.26OMA TRAINING**

Effective January 1, 2010, each public body, including public pension boards, must delegate officers or members to receive training on compliance with the OMA.<sup>664</sup> The designated officers must complete an electronic training program administered by the Public Access Counselor of the Illinois Attorney General's Office.

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<sup>663</sup> 5 ILCS 120/3.5(a).

<sup>664</sup> 5 ILCS 120/1.05.

## **CHAPTER 14**

### **THE FREEDOM OF INFORMATION ACT**

- A. §14.1 INTRODUCTION
- B. §14.2 THE FREEDOM OF INFORMATION ACT
- C. §14.3 PURPOSE OF THE ACT
- D. §14.4 PRESUMPTION OF DISCLOSABILITY
- E. §14.5 DEFINITIONS
  - 1. §14.6 PUBLIC BODY
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  - 4. §14.9 COPYING
  - 5. §14.10 RECORDS AND FUNDS
- F. §14.11 INSPECTION AND COPYING  
OF PUBLIC RECORDS
- G. §14.12 FREEDOM OF INFORMATION OFFICERS
- H. §14.13 EXEMPTIONS
- I. §14.14 FEES
- J. §14.15 DENIALS
- K. §14.16 COURT ACTION
- L. §14.17 PUBLIC ACCESS COUNSELOR

## **CHAPTER 14**

## **THE FREEDOM OF INFORMATION ACT**

### **A. §14.1 INTRODUCTION**

In addition to knowing the provisions of the Illinois Pension Code, police pension trustees must also be familiar with the provisions of the Illinois Freedom of Information Act.<sup>665</sup> This Act allows the public to have access to information and documentation regarding the operation and affairs of governmental agencies.

### **B. §14.2 THE FREEDOM OF INFORMATION ACT**

It is the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of the government. Such access allows individuals to monitor governmental action and ensure that such action is being conducted in the public interest.

### **C. §14.3 PURPOSE OF THE ACT**

The primary purpose of the Freedom of Information Act (FOIA) is to require public bodies to expeditiously provide public records to private individuals and entities. However, the law does not require public agencies to maintain or prepare any public record not normally prepared in the ordinary course of public business.<sup>666</sup> In addition, the FOIA is not intended to allow unwarranted invasions of personal privacy. The Act also is not intended to unduly burden public resources or to disrupt the work of any public body.

### **D. §14.4 PRESUMPTION OF DISCLOSABILITY**

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<sup>665</sup> 5 ILCS 140/1 et seq.

<sup>666</sup> 5 ILCS 140/1.

Under the Act, there is a presumption that all public records are open to inspection and copying. A public body that claims a record or document is exempt from disclosure has the burden of proving the exemption by clear and convincing evidence.<sup>667</sup>

**E.           §14.5        DEFINITIONS**

The key to understanding any piece of legislation starts with a review of the statute's definitions. The FOIA contains a number of important definitions.

**1.        §14.16        PUBLIC BODY**

The term public body is very broadly defined under the Act. The definition includes: legislative, executive and administrative bodies of all branches of Illinois state and local government, including Article 3 and Article 4 police and firefighter pension boards.<sup>668</sup>

**2.        §14.7        PUBLIC RECORD**

The term "public record" is also broadly defined and includes all records, documentation, memoranda and electronic communications of any sort, pertaining to the transaction of public business.<sup>669</sup>

**3.        §14.8        PRIVATE INFORMATION**

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<sup>667</sup> 5 ILCS 140/1.2.

<sup>668</sup> 5 ILCS 140/2(a).

<sup>669</sup> 5 ILCS 140/2(b).

“Private information” is exempt from disclosure and includes unique identifiers, such as social security numbers, driver’s license numbers, employer identification numbers, personal financial information, medical records, home and personal telephone numbers and e-mail addresses.<sup>670</sup> Home addresses and personal license plate numbers also usually fall within this definition.

**4. §14.9        COPYING**

“Copying” means the reproduction of a public record by any means.<sup>671</sup>

**5. §14.10        RECORDS OF FUNDS**

All records relating to the use of public funds by units of local government are subject to disclosure under the FOIA.<sup>672</sup> Thus, the amount of pension payments paid to any beneficiary is subject to disclosure.

**F.            §14.11        INSPECTION AND COPYING  
OF PUBLIC RECORDS**

Each public body is required to make available for inspection and copying all public records except those that are considered exempt.<sup>673</sup> FOIA requests must be made in writing.<sup>674</sup>

It is extremely important that a pension board acts quickly when it receives a FOIA request. A pension board is under an extremely short timetable when it comes to FOIA

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<sup>670</sup> 5 ILCS 140/2(c-5).

<sup>671</sup> 5 ILCS 140/2(d).

<sup>672</sup> 5 ILCS 140/2.5.

<sup>673</sup> 5 ILCS 140/3(a).

<sup>674</sup> 5 ILCS 140/3(c).

requests. A public body must either comply with or deny a FOIA request within five (5) business days after receipt of the request.<sup>675</sup> The response to the FOIA request may be extended for not more than five (5) additional business days for various reasons, including the number of documents included in the request.<sup>676</sup> The FOIA requestor and the public body may agree to a longer response time. Any such agreement should be in writing.

The failure to file a timely response or request an extension under the Act has consequences. A public body that fails to timely respond, cannot charge a fee for the copying costs and cannot treat the request as unduly burdensome under the Act.<sup>677</sup>

If a public body claims that a FOIA request is unduly burdensome, it must offer the requestor an opportunity to confer in an attempt to reduce the FOIA request to manageable proportions. The public body must also indicate why the request is unduly burdensome.<sup>678</sup> Any claim that the request is unduly burdensome is treated as a denial of the FOIA request. Given the above, it is imperative that FOIA requests are acted upon immediately and sent to the pension board's FOIA officer as soon as possible.

#### **G.            §14.12        FREEDOM OF INFORMATION OFFICERS**

Each public body, including pension boards, must designate one or more individual to serve as its Freedom of Information Act Officer.<sup>679</sup> The Freedom of Information Act officer is

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<sup>675</sup> 5 ILCS 140/3(d).

<sup>676</sup> 5 ILCS 140/3(e).

<sup>677</sup> 5 ILCS 140/3(d).

<sup>678</sup> 5 ILCS 140/3(g).

<sup>679</sup> 5 ILCS 140/3.5(a).

to receive a copy of any FOIA request and ensure that the pension board responds to the request in a timely manner. It is recommended that the pension board's attorney serve as Freedom of Information Act officer, given the many legal issues that can arise with FOIA requests.

All Freedom of Information Act officers must complete a training course offered by the Public Access Counselor, which is a part of the Illinois Attorney General's office.<sup>680</sup> Once again, it is extremely important that all FOIA requests be transmitted to the Freedom of Information Act officer as soon as possible.

#### H. **§14.13 EXEMPTIONS**

There are a number of documents that are exempt from disclosure under the FOIA. When a FOIA request of a public record contains certain information that is exempt from disclosure, but also contains non-exempt information, the agency may redact the information that is exempt.<sup>681</sup>

The following exemptions apply to documents maintained by pension boards:

- (1) Information prohibited from disclosure under federal or state law.<sup>682</sup> Thus, executive session minutes of pension board proceedings are not subject to disclosure by virtue of the Open Meetings Act.<sup>683</sup>
- (2) Personal information contained within public records, which would constitute an unwarranted invasion of personal privacy,<sup>684</sup>

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<sup>680</sup> 5 ILCS 140/3.5(d).

<sup>681</sup> 5 ILCS 140/7(l).

<sup>682</sup> 5 ILCS 140/7(l)(a).

<sup>683</sup> 5 ILCS 120/1, *et seq.*

- (3) Records of a public body created in the course of administrative enforcement proceedings.<sup>685</sup>
- (4) Preliminary drafts, notes, recommendations or memoranda in which opinions are expressed under a claim that they are privileged or confidential.<sup>686</sup> Thus, memoranda from the pension Board's legal counsel to pension trustees sent under the attorney client-privilege would not be subject to disclosure.
- (5) All financial information obtained by a public pension fund.<sup>687</sup>

**I.           §14.14       FEES**

A public body is authorized to charge fees in certain instances. However, the public body cannot charge the requestor for the costs of any search for and review of records, or the personal costs in reproducing the records.<sup>688</sup>

No fees are charged for the first fifty (50) pages of black and white copies. After that, the public body may charge a fee for the actual cost of reproducing the documents, not to exceed fifteen (15) cents per page.<sup>689</sup>

Documents can be furnished without charge or at a reduced rate if the requestor indicates that a waiver or reduction of fee is in the public interest.

**J.           §14.15       DENIALS**

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<sup>684</sup> 5 ILCS 140/7(c).

<sup>685</sup> 5 ILCS 140/7(d).

<sup>686</sup> 5 ILCS 140/7(f).

<sup>687</sup> 5 ILCS 140/7(g).

<sup>688</sup> 5 ILCS 140/6(a).

<sup>689</sup> 5 ILCS 140/6(b).

If a request for records is denied on the basis of an exemption, the denial must specify the exemption.<sup>690</sup>

**K.        §14.16        COURT ACTION**

Any person denied access to inspect or copy a public record may file suit.<sup>691</sup> The lawsuit may be brought in the county where the public body has its principal office.<sup>692</sup>

**L.        §14.17        PUBLIC ACCESS COUNSELOR**

A person who has a FOIA request denied may also file a request for review with the Public Access Counselor established under the Illinois Attorney General's Office.<sup>693</sup> The request for review must be filed no later than sixty (60) days after the date of the final denial.

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<sup>690</sup> 5 ILCS 140/9(b).

<sup>691</sup> 5 ILCS 140/11(a).

<sup>692</sup> 5 ILCS 140/11(c).

<sup>693</sup> 5 ILCS 140/9.5(a).

## **CHAPTER 15**

### **REGULATION BY THE DEPARTMENT OF INSURANCE**

- A. §15.1 INTRODUCTION
- B. §15.2 POWERS OF ADMINISTRATIVE AGENCIES GENERALLY
- C. §15.3 SPECIFIED POWERS OF THE DEPARTMENT OF INSURANCE
  - 1. §15.4 RULEMAKING POWERS OF THE DEPARTMENT OF INSURANCE
    - a. §15.5 DEPARTMENT OF INSURANCE RULES
    - 2. §15.6 EXAMINATION POWERS
    - 3. §15.7 HEARING POWERS
    - 4. §15.8 ADVISORY SERVICES
- D. §15.9 REPORTING REQUIREMENTS
- 1. §15.10 FEES
- E. §15.11 JUDICIAL ACTION

## **CHAPTER 15**

### **REGULATION BY THE DEPARTMENT OF INSURANCE**

## **A.           §15.1        INTRODUCTION**

Police pension boards under Article 3 are regulated by the Illinois Department of Insurance, Public Pension Division.<sup>694</sup> The scope and extent of the Department's regulatory functions, as well as administrative regulation in general, are discussed in the following sections of this Chapter.

In addition to its regulatory functions, the Department of Insurance can provide advice to Article 3 pension boards and pension trustees as to the operation of the pension board. If a pension board has questions or problems, a good source of advice is the Public Pension Division, which can be called at (217) 782-7542, or on line at [www.insurance.illinois.gov](http://www.insurance.illinois.gov).

## **B.           §15.2        POWERS OF ADMINISTRATIVE AGENCIES GENERALLY**

The Department of Insurance, as a state agency is a creature of statute and has no general or common law powers.<sup>695</sup> Any power or authority claimed by an administrative agency, such as the Division of Insurance, must find its source within the provisions of the statute, which created the administrative agency.<sup>696</sup> The authority of an administrative agency must either arise from the express language of the statute or devolve by implication from the statute as an incident to achieving the objectives for which the agency was created.<sup>697</sup> An administrative agency cannot extend its statutory authority through the enactment of administrative rules.<sup>698</sup>

## **C.           §15.3        SPECIFIED POWERS OF DEPARTMENT OF INSURANCE**

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<sup>694</sup> 40 ILCS 5/22-501.1.

<sup>695</sup> City of Chicago vs. Fair Employment Practices Commission, 65 Ill.2d 108, 347 N.E.2d 1154 (1976).

<sup>696</sup> Bio-Medical Laboratories, Inc. vs. Trainor, 68 Ill.2d 540, 370 N.E.2d 223, 12 Ill. Dec. 600 (1977).

<sup>697</sup> Fahey vs. Cook County Police Merit Board, 21 Ill.App.3d 315 N.E.2d 573 (1974).

<sup>698</sup> Du-Mont Ventilating Co. vs. Department of Revenue, 73 Ill.2d 243, 383 N.E.2d 197, 22 Ill. Dec. 721 (1978).

Chapter 1, 1A and Chapter 22 of the Pension Code gives the Department of Insurance, certain specific powers and functions. Among these powers are: (1) rule-making, (2) reporting, (3) examination of pension funds, (4) holding of hearings, (5) assessment of penalties, (6) taking court action through the Illinois Attorney General's Office. These functions are discussed in some of the sections below.

There are certain things that the Department of Insurance cannot do. The courts have held that the Department cannot review a pension board's decision denying or granting a specific disability benefit.<sup>699</sup> According to the courts, the Department has the statutory authority to audit the financial transactions and examine a pension board's fiscal policies but the Department has no authority to review or modify the administrative adjudications and decisions of a pension board.<sup>700</sup> When dealing with administrative agencies such as the Department of Insurance, the statute setting forth the agency's powers and any rules promulgated by the agency should be examined in order to make sure that the agency is operating within the scope of such statute and rules.

The Pension Code defines the Department's statutory powers as follows:

§22-502. "Examinations and investigations. The Division shall make periodic examinations and investigations of all pension, annuity and retirement funds or systems established and maintained for the benefit of employees and officers of governmental units \* \* \*. The examinations to be made by the Division hereunder shall include an audit of financial transactions, investments, policies and proceedings, an examination of books, records, documents, files and other pertinent memoranda relating to the financial, statistical and administrative operations, and a review of policies and proceedings maintained for the administration and operation of the fund or system."<sup>701</sup>

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<sup>699</sup> Park Forest Police Pension Board vs. Washburn, 153 Ill.App.3d 482, 505 N.E.2d 1209, 106 Ill. Dec. 418 (1987); People ex rel. Mauck vs. Municipal Employee's Annuity and Benefit Fund, 34 Ill.App.3d 191, 340 N.E.2d 23 (1975).

<sup>700</sup> Park Forest Police Pension Board vs. Washburn, *supra*.

<sup>701</sup> 40 ILCS 5/22-502.

In one case,<sup>702</sup> the Department attempted to require police and firefighter pension boards to pay their annual filing fees via an automated clearing house (ACH) collection system.

Under this ACH collection system, each affected public pension board was required to allow the Illinois Department of Insurance to automatically debit the assets of each public pension fund in order to pay the annual compliance fees. No other entities that the Department of Insurance collects fees from were required to pay such fees through an automatic debit of their assets. There is no express provision in the Illinois Pension Code that would require a police or firefighter pension board created under Article 3 or Article 4 of the Illinois Pension Code to agree to an automated clearing house (ACH) collection system of pension fund assets, which would amount to an automatic debit of pension fund assets. Approximately ninety police and firefighter pension boards and the IPPFA sued the Department of Insurance contesting that agency's authority to impose a mandatory ACH collection system.

Both the circuit court and the appellate court ruled in favor of the pension boards. The question before the appellate court was whether the Pension Code provisions relied upon by the Department<sup>703</sup> required ACH debiting. The appellate court agreed with the pension boards and held that the Department lacked such authority. The court reasoned as follows in construing 40 ILCS 5/1A-107:

Subsection (ii) directs the Division to electronically exchange information with public pension funds; subsection (iii) allows the Division to receive data from the public pension funds in the form of "computer processible media." If we were to risk translating "computer processible media" into English, we would conclude that it sounds like the Division and the pension funds are allowed to use e-mail to exchange information that once passed by post and telephone. We might also risk the conclusion that there is enough wiggle room in the statute to allow electronic debiting of bank accounts if both creditor and debtor agree. But we need not speculate. The narrow

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<sup>702</sup> Chicago Heights Police Pension Board vs. Illinois Department of Insurance, 323 Ill.App.3d 913, 753 N.E.2d 343, 257 Ill.Dec.148 (2001).

<sup>703</sup> 40 ILCS 5/1A-107.

question is whether the language allows the creditor to compel the debtor to discharge a debt electronically. If that were the intent of the legislature in urging automation of the Division, and particularly in the sensitive area of money changing hands, we believe the legislature would have said so clearly.

To the extent an agency acts without statutory authority, the agency acts without jurisdiction. *City of Chicago v. Fair Employment Practices Comm'n* 65 Ill. 2d 108, 112-12, 357 N.E.2d 1154 (1976). Section 4415.70 of the Illinois Administrative Code, requiring payment of annual compliance fees by ACH debit is an invalid exercise of the Department's rule-making power and is void.<sup>704</sup>

The Illinois Pension Code also creates the Public Pension Division as a part of the Department of Insurance.<sup>705</sup> The Public Pension Division has the express power to perform the duties and functions set out in the Pension Code, which would include the regulation of police and firefighter pension funds.

#### **1. §15.4      RULEMAKING POWERS OF THE DEPARTMENT OF INSURANCE**

An administrative agency has the power to issue only such rules and regulations as are authorized by statute and such rules and regulations must be in accordance with the standards and policies set forth in the statute.<sup>706</sup> The Pension Code expressly authorizes the Department of Insurance to make reasonable rules applicable to pension funds and specifically Article 3 and Article 4 pension funds.<sup>707</sup> The Department has the board authority to make any rules necessary for making effective the

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<sup>704</sup> Chicago Heights Police Pension Board, et al vs. Illinois Department of Insurance, Supra, 753 N.E.2d at 346.

<sup>705</sup> 40 ILCS 5/1A-101.

<sup>706</sup> People vs. Keuper 111 Ill.App.2d 42, 249 N.E.2d 42 (1969).

<sup>707</sup> 40 ILCS 5/1A-103.

provisions of the Pension Code and for carrying out the duties given to the Department of Insurance under the law.<sup>708</sup> Administrative rules and regulations have the force and effect of law.<sup>709</sup>

In construing agency rules, the courts accord substantial discretion to the agency's construction and interpretation of such rules.<sup>710</sup> An administrative rule of the Department of Insurance concerning what constitutes the "salary" of a firefighter or police officer under the Pension Code was held to be a valid exercise of the Department's rulemaking power.<sup>711</sup>

**a. §15.5        DEPARTMENT OF INSURANCE RULES**

The Department of Insurance has in fact promulgated certain rules dealing with pension examination procedures and the definition of salary. The rules can be found at 50 ILL.Adm.Code §6302, et seq. The Division has also issued rules relating to hearing procedures. In addition to promulgated rules, the Division has also issued policy statements and a handbook for police pension trustees.

The Public Employee Pension Fund Division of the Division of Insurance is in turn required to file an annual report with the General Assembly setting forth the financial statements of all the various funds within the State of Illinois.<sup>712</sup>

**2.        §15.6        EXAMINATION POWERS**

The Department of Insurance now has specific statutory authority to examine and investigate any police pension fund established under Article 3.<sup>713</sup> These examination powers include the following:

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<sup>708</sup> Id.

<sup>709</sup> Northern Illinois Auto Wreckers vs. Dixon, 75 Ill.2d 53, 387 N.E.2d 320, 25 Ill. Dec. 664 (1979).

<sup>710</sup> Slayton vs. Board of Police & Fire Commissioners, 102 Ill.App.3d 335, 430 N.E.2d 41, 58 Ill. Dec. 99 (1981).

<sup>711</sup> Park Ridge Firemen's Pension Fund vs. Department of Insurance, 109 Ill.App.3d 919, 441 N.E.2d 107, 65 Ill. Dec. 315 (1982).

<sup>712</sup> 40 ILCS 5/22-505.

- (a) the power to audit all financial transactions, investment policies and procedures;<sup>714</sup>
- (b) the power to examine any books, records or documents relating to the financial, statistical or administrative operation of the pension fund;<sup>715</sup>
- (c) the power to review any policies or procedures maintained in the administration or operation of the pension fund;<sup>716</sup>
- (d) the power to determine whether the pension fund is in compliance with the statutory provisions governing the fund;<sup>717</sup>
- (e) the power to determine whether the pension fund's policies comply with the Pension Code and effectively protect and preserve the rights of participants;<sup>718</sup>
- (f) the power to determine whether or not proper and adequate documentation is being maintained by the pension fund relating to the payment of pension benefits.<sup>719</sup>

Any investigation conducted by the Department must be labeled and identified as such.<sup>720</sup> A copy of the Department's report of examination or investigation is to be served upon the pension board.<sup>721</sup>

The Department also has the power to subpoena records or witnesses as part of any investigation.<sup>722</sup> Witnesses that can be subpoenaed include any pension fund trustee, officer, agent, actuary, attorney, employee, or any other person having information or documentation relating to the

<sup>713</sup> 40 ILCS 5/1A-104(b).

<sup>714</sup> 40 ILCS 5/1A-104 (b) (1).

<sup>715</sup> 40 ILCS 5/1A-104 (b) (2).

<sup>716</sup> 40 ILCS 5/1A-104 (b) (3).

<sup>717</sup> 40 ILCS 5/1A-104 (b) (4).

<sup>718</sup> 40 ILCS 5/1A-104 (b) (5).

<sup>719</sup> 40 ILCS 5/1A-104 (b) (6).

<sup>720</sup> 40 ILCS 5/1A-104 (b).

<sup>721</sup> *Id.*

<sup>722</sup> 40 ILCS 5/1A-105.

pension fund.<sup>723</sup> The Department may seek to enforce its subpoena power in the circuit court of the county in which the pension fund had its principal office.<sup>724</sup>

### **3. §15.7        HEARING POWERS**

Once a report of examination or investigation is issued and served upon the pension board, the board or its legal representative can request a hearing as to any facts contained in the report.<sup>725</sup> The right to a hearing is to be conducted before the report can be made public. The Department may compel the attendance of witnesses or the production of documents at such hearings.<sup>726</sup>

The Department of Insurance has promulgated rules regarding its administrative hearing procedures.<sup>727</sup> The hearing officer is also an employee of the Department of Insurance. If the pension board is not satisfied with the decision of the Department suit may be brought in the circuit court where the pension board has its principal office.<sup>728</sup>

### **4. §15.8        ADVISORY SERVICES**

The Public Pension Division may now by statute, render advisory services to firefighter and police pension funds on any matter pertaining to the operation of such pension funds.<sup>729</sup> These advisory opinions can relate to any substantive, legislative or administrative policy. A pension board that is not clear on how to proceed in a particular situation should utilize the Division's advisory services. The pension board should also in such instances, should also seek a second opinion from the

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<sup>723</sup> *Id.*

<sup>724</sup> *Id.*

<sup>725</sup> 40 ILCS 5/1A-104 (b).

<sup>726</sup> 40 ILCS 5/1A-105.

<sup>727</sup> 50 Illinois Administrative Code Part 2402.

<sup>728</sup> 40 ILCS 5/4-148.

<sup>729</sup> 40 ILCS 5/1A-106.

pension board's legal counsel. The Division can also recommend certain corrective action or clarifying legislation that it may deem necessary.<sup>730</sup> The recommendation can be made to the General Assembly as part of the Division's biennial report. If a pension board has questions concerning any course of conduct a request for an advisory opinion may prove helpful.

These opinions are only advisory in nature and are not binding on pension boards or the courts.<sup>731</sup> In one case, it was held that a pension board could not change the salary calculation on a disability pension it previously awarded based upon an advisory opinion issued by the Department indicating that the initial calculation was erroneous.<sup>732</sup>

**D.           §15.9           REPORTING REQUIREMENTS**

Under Pension Code amendments, effective January 1, 1998, pension boards must now file an annual statement that must include the following:

- (1) a financial balance sheet as of the close of the fiscal year;
- (2) a statement of income and expenditures;
- (3) an actuarial balance sheet;
- (4) statistical data reflecting age, service and salary characteristics concerning all participants;
- (5) special facts concerning disability or other claims;
- (6) details on investment transactions that occurred during the fiscal year covered by the report;
- (7) details on administrative expenses; and

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<sup>730</sup> *Id.*

<sup>731</sup> Kosakowski vs. Calumet City Police Pension Fund, 389 Ill.App.3d 381, 906 N.E.2d 689, 329 Ill.Dec. 491 (2009).

<sup>732</sup> *Id.*

- (8) such other supporting data and schedules as in the judgment of the Division may be necessary for a proper appraisal of the financial condition of the pension fund and the results of its operations.<sup>733</sup>

A pension board that fails to file the annual statement when due, can be penalized up to \$100.00 per day.<sup>734</sup>

A pension board established under Article 3 must also file an actuarial statement applicable to the plan year.<sup>735</sup> The actuarial statement must be prepared by or under the supervision of a qualified actuary and signed by the actuary.<sup>736</sup> Failure to timely file the actuarial statement also carries a penalty of up to \$100.00 per day.<sup>737</sup>

#### **1. §15.10 FEES**

A filing fee is required when filing the annual statement. In the case of Article 3 and Article 4 pension funds the annual fee will be 0.007% (0.7 basis points) of the total assets of the pension fund, but not more than \$6,000.00.<sup>738</sup> The fee is due on June 30 following the end of the fiscal year.<sup>739</sup> Failure to pay the required annual fee also carries a penalty not to exceed 25% of the fee due.<sup>740</sup>

#### **E. §15.11 JUDICIAL ACTION**

If a pension board or an officer is fined by the Division of Insurance for non-compliance and the fine is not paid within 30 days from the date of assessment, the Illinois Attorney General or the States

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<sup>733</sup> 40 ILCS 5/4A-109.

<sup>734</sup> 40 ILCS 5/1A-113.

<sup>735</sup> 40 ILCS 5/1A-111(a).

<sup>736</sup> *Id.*

<sup>737</sup> 40 ILCS 5/1A-113.

<sup>738</sup> 40 ILCS 5/4-1A-112(a).

<sup>739</sup> 40 ILCS 5/1A-112(b).

<sup>740</sup> 40 ILCS 5/1A-113(c).

Attorney of the county in which the pension fund is located can bring suit on behalf of the Department of Insurance to collect the penalty and for any additional relief as the nature of the case may require.<sup>741</sup>

In addition, suit may be brought by the Illinois Attorney General to:

- (a) obtain relief against a fiduciary for breach of fiduciary duty;
- (b) enjoin any act or practice, which violates any provision of the Pension Code;
- (c) obtain other appropriate equitable relief to redress any violation or to enforce any provision of the Code.<sup>742</sup>

As previously indicated, the Division of Insurance cannot sue a pension board in an attempt to change the board's award or denial of a specific pension benefit.

Police pension boards can sue the Department of Insurance to review the Department's administrative decisions<sup>743</sup> or to obtain a declaratory judgment against the Department of Insurance.<sup>744</sup>

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<sup>741</sup> *Id.*

<sup>742</sup> 40 ILCS 5/1-115.

<sup>743</sup> Park Ridge Firemen's Pension Fund, vs. Department of Insurance, 108 Ill.App.3d 919, 441 N.E.2d 107, 65 Ill. Dec. 315 (1982).

<sup>744</sup> Board of Trustees vs. Mathias, 109 Ill.App.3d 894, 441 N.E.2d 362, 65 Ill. Dec. 449 (1982); Barrington Police Pension Board vs. Department of Insurance, 211 Ill.App.3d 698, 570 N.E.2d 622, 156 Ill. Dec. 146 (1991).

## **CHAPTER 16**

### **JUDICIAL REVIEW AND LITIGATION**

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## **CHAPTER 16**

### **JUDICIAL REVIEW AND LITIGATION**

## A. §16.1 INTRODUCTION

Decisions made by police pension boards have been challenged in the circuit courts of Illinois in a number of different ways. Article 3 provides for the following method to review police pension board decisions:

The provisions of the Administrative Review Act, and all amendments and modifications thereof...shall apply to and govern all proceedings for the judicial review of final administrative decisions of the retirement board provided for under this Article.<sup>745</sup>

Judicial review under the Administrative Review Law<sup>746</sup> is in most instances the only method of reviewing pension board decisions. The administrative review provisions contained in the Code of Civil Procedure have been used to review pension board decisions denying disability benefits,<sup>747</sup> granting a non-duty disability benefit when a duty-related benefit was requested,<sup>748</sup> reducing the amount of disability benefits awarded,<sup>749</sup> denying admission into the pension fund,<sup>750</sup> terminating disability benefits,<sup>751</sup> and the setting of a lower retirement pension than that requested by the applicant.<sup>752</sup>

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<sup>745</sup> 40 ILCS 5/3-148. The term “administrative decision” is as defined in 735 ILCS 5/3-101 of the Illinois Code of Civil Procedure.

<sup>746</sup> 735 ILCS 5/3-102, 5/3-103.

<sup>747</sup> Fithian vs. Retirement Board, 85 Ill.App.3d 950, 407 N.E.2d 737, 41 Ill. Dec. 239 (1980); Hahn vs. Woodstock Police Pension Board, 138 Ill.App.3d 206, 485 N.E.2d 871, 92 Ill. Dec. 825 (1985); Peterson vs. Board of Trustees Des Plaines Firemen's Pension Fund, 54 Ill.2d 260, 296 N.E.2d 721 (1973).

<sup>748</sup> Evert vs. Lake Forest Firefighters' Pension Fund, 180 Ill.App.3d 656, 536 N.E.2d 143, 129 Ill. Dec. 459 (1989); Gloss vs. Chicago Heights Firemen's Pension Fund, 132 Ill..App.2d 730, 270 N.E.2d 472 (1971).

<sup>749</sup> Taft vs. Winthrop Harbor Police Pension Board, 133 Ill.App.3d 566, 479 N.E.2d 31, 88 Ill. Dec. 696 (1985).

<sup>750</sup> Esner vs. North Riverside Firemen's Pension Fund, 68 Ill.App.3d 541, 386 N.E.2d 288, 25 Ill. Dec. 17 (1979); Sanders vs. Springfield Police Pension Fund, 122 Ill.App.3d 1087, 445 N.E.2d 501, 68 Ill. Dec. 53 (1983); Gordan vs. Joliet Firemen's Pension Fund, 77 Ill.App.2d 234, 222 N.E.2d 28 (1966).

<sup>751</sup> Antonelli vs. Hillside Police Pension Board, 287 Ill.App.3d 348, 678 N.E.2d 773, 222 Ill.Dec. 901 (1997); O'Brien vs. East St. Louis Firemen's Pension Fund, 64 Ill.App.3d 592, 381 N.E.2d 813, 21 Ill.Dec. 486 (1978). Wendl vs. Moline Police Pension Board, 96 Ill.App.3d 482, 421 N.E.2d 584, 51 Ill. Dec. 949 (1981). Moore vs. Sanitary District Trustees' Annuity and Benefit Fund, 157 Ill.App.3d 158, 510 N.E.2d 87, 109 Ill. Dec. 466 (1987).

<sup>752</sup> Herhold vs. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago, 118 Ill.2d 436, 515 N.E.2d 1240, 113 Ill. Dec. 933 (1987).

Judicial review of pension board decisions in limited situations have also been accomplished through declaratory judgment actions<sup>753</sup> and mandamus proceedings.<sup>754</sup> These methods are a far less common form of judicial review.

**B.            §16.2            STANDING TO SUE**

The parties who are able to sue a pension board in order to seek judicial review of a board's decision are limited. A party must be adversely affected and have a legitimate interest in the outcome of the pension board proceeding before a lawsuit can be filed against a pension board. Obviously the police officer adversely affected by the pension board's decision is allowed to maintain a court proceeding.<sup>755</sup> A surviving spouse also is entitled to maintain an action,<sup>756</sup> as is the participant's minor child.<sup>757</sup> Given the current state of the law, any beneficiary or participant adversely affected from a decision of a pension board would seem to have standing to sue the pension fund regarding denial of benefits.

Certain parties do not have standing to sue a pension board. A pension board trustee who does not agree with a decision either granting or denying a disability benefit has no right to challenge that

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<sup>753</sup> Barrington Police Pension Board vs. Department of Insurance, 211 Ill.App.3d 698, 570 N.E.2d 622, 156 Ill. Dec. 146 (1991); Gualano vs. City of Des Plaines, 139 Ill.App.3d 456, 487 N.E.2d 1050, 94 Ill. Dec. 173 (1985); Swibaker vs. Board of Trustees, 140 Ill.App.3d 550, 488 N.E.2d 1052, 94 Ill. Dec. 805 (1986).

<sup>754</sup> Redding vs. Oak Park Police Pension Board, 115 Ill.App.3d 242, 450 N.E.2d 763, 71 Ill. Dec. 75 (1983); Stone vs. Belvedere Police Pension Fund, 13 Ill. App.3d 357, 300 N.E.2d 272 (1973).

<sup>755</sup> See, e.g., Evert vs. Lake Forest Firefighters' Pension Fund, 180 Ill.App.3d 656, 536 N.E.2d 143, 129 Ill. Dec. 459 (1989).

<sup>756</sup> Edwards vs. Marion Police Pension Fund, 61 Ill.2d 330, 335 N.E.2d 440 (1975); Davis vs. Retirement Board, 4 Ill.App.3d 221, 280 N.E.2d 735 (1972).

<sup>757</sup> Field vs. Alton Firefighrers' Pension Fund, 190 Ill.App.3d 730, 138 Ill. Dec. 61, 546 N.E.2d 1116 (1989).

decision in circuit court.<sup>758</sup> The Department of Insurance cannot sue to review pension board decisions granting or denying benefits in a particular case.<sup>759</sup>

Municipalities or municipal officials would also seem to lack standing to review a pension board's decision unless the municipality was a party at the pension board hearing. However, one court has held that there may be some instances where a municipality could seek review of a pension board's decision even though not a party to the administrative proceeding.<sup>760</sup> In that case the appellate court stated that in order for the municipality to have standing, the pension board's decision must impact a duty or interest of the municipality. This court did point out however, that a municipality will not have standing to seek review of every case that comes before a pension board and the municipality has no authority to review or modify adjudications made by a pension board.<sup>761</sup>

Does a municipality have an absolute right to take part or intervene in a pension board proceeding so that it will have standing to sue in the circuit court? The answer is no, according to one appellate court decision.<sup>762</sup> In that case the municipality appeared before the pension board and wanted to intervene in a disability pension proceeding. The pension board denied the village's request to participate. The pension board's decision was affirmed on appeal, the appellate court ruling that the board did not abuse its discretion in denying the municipality the right to participate in the disability proceeding.<sup>763</sup> One circuit court has ruled that a municipality that was denied its request to intervene in

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<sup>758</sup> Hadley vs. Batavia Firemen's Pension Fund, 113 Ill. App. 3d 866, 447 N.E.2d 958, 69 Ill.Dec. 523 (1983).

<sup>759</sup> Park Forest Police Pension Board vs. Washburn, 153 Ill.App.3d 482, 505 N.E.2d 1209, 106 Ill.Dec. 418 (1987); People ex rel. Mauck vs. Municipal Employee's Annuity and Benefit Fund of Chicago, 34 Ill.App.3d 191, 340 N.E.2d 23 (1975).

<sup>760</sup> Karfs vs. City of Belleville, 329 Ill.App.3d 1198, 770 N.E.2d 256, 264 Ill.Dec. 362 (2002).

<sup>761</sup> Karfs, supra, 770 N.E.2d at 261

<sup>762</sup> Village of Stickney vs. Police Pension Fund of Stickney, 347 Ill.App.845, 807 N.E.2d 1078, 283 Ill.Dec. 237 (2004).

<sup>763</sup> Village of Stickney, supra, 807 N.E.2d at 1085.

a disability pension proceeding had no standing to seek review of the board's decision because it was not a party to the administrative proceeding.<sup>764</sup>

The Pension Code specifically provides that a civil action may be brought by the Illinois Attorney General, or a participant, beneficiary or fiduciary to enforce the provisions contained in the Pension Code or enjoin any conduct that violates the Code.<sup>765</sup> Thus, by statute, police pension boards can be sued by any participant or beneficiary who alleges that the board has violated a provision of the Pension Code. One reported case has allowed the IPPFA to sue as a party plaintiff in litigation involving matters of general concern to police and firefighter pension boards.<sup>766</sup>

#### C.            **§16.3            IMMUNITY FROM SUIT**

Pension boards cannot be sued for certain claims. The appellate court has held that a pension board cannot be sued for handicap discrimination under the Illinois Human Rights Act.<sup>767</sup> Pension boards are thus immune from state claims of discrimination. In cases involving claims of civil rights violations under 42 U.S.C. 1983, individual pension board members may be entitled to absolute immunity<sup>768</sup> or qualified immunity.<sup>769</sup>

#### D.            **§16.4            ADMINISTRATIVE REVIEW PROCEEDINGS**

Decisions of pension boards denying or reducing disability benefit claims are reviewable by the circuit court in the county where the board has its place of operation. Under Article 3 of the Pension

<sup>764</sup> City of Waukegan vs. Carlson, 05 MR 719, (Circuit Court of Lake County, 2006).

<sup>765</sup> 40 ILCS 5/1-115.

<sup>766</sup> McNamee vs. State of Illinois, 173 Ill.2d 438, 672 N.E.2d 1159, 220 N.E.2d 147 (1996).

<sup>767</sup> Urbana Police Pension Fund vs. Illinois Human Rights Commission, 141 Ill.App.3d 447, 490 N.E.2d 232, 95 Ill. Dec. 759 (1986); Benton Police Pension Fund vs. Illinois Human Rights Commission, 160 Ill.App.3d 55, 513 N.E.2d 29, 111 Ill.Dec. 783 (1987).

<sup>768</sup> See, Lake Country Estates, Inc. vs. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Vakas vs. Rodriguez, 728 F.2d 1293 (10<sup>th</sup> Cir. 1982).

<sup>769</sup> See, Scheuer vs. Rhodes, 416 U.S. 232 (1974); Slate vs. McFetridge, 484 F.2d 1169 (7<sup>th</sup> Cir. 1973).

Code, any final administrative decision of a police officer's pension board is subject to judicial review under the administrative review provisions of the Illinois Code of Civil Procedure.<sup>770</sup> The term "administrative decision" means any decision, order or determination of any administrative agency rendered in a particular case, which effects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency.<sup>771</sup>

Judicial review under the Illinois Administrative Review Law is the exclusive method used to review police pension board decisions.<sup>772</sup> In one case a court dismissed a disabled police officers declaratory judgment complaint regarding the reduction of his disability benefits because he failed to exhaust his remedies by filing a complaint for administrative review.<sup>773</sup>

## **1. §16.5        EXHAUSTION OF ADMINISTRATIVE REMEDIES**

Before filing suit against a pension board, all administrative remedies must be exhausted. Under the exhaustion of remedies doctrine, parties aggrieved by the action of an administrative agency such as a pension board, generally cannot seek court review of the agency action without pursuing all administrative remedies available.<sup>774</sup> The reasons for the exhaustion of remedies doctrine are: to allow the administrative agency to develop the case fully and render a decision based on all of the facts; to allow the agency to utilize its expertise; and to allow the aggrieved party an opportunity to succeed before the agency so that judicial review would be unnecessary.<sup>775</sup> Strict compliance with the

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<sup>770</sup> 735 ILCS 5/1-101, et seq.

<sup>771</sup> *Id.*; Taylor vs. State University Retirement System, 159 Ill.App.3d 372, 512 N.E.2d 399, 111 Ill. Dec. 283 (1987).

<sup>772</sup> 40 ILCS 5/4-148. See also, Kellan vs. Park Ridge Firemen's Pension Fund, 194 Ill.App.3d 573, 141 Ill. Dec. 271, 551 N.E.2d 264 (1990); Markham vs. Kankakee Fireman's Pension Fund, 198 Ill.App.3d 602, 144 Ill. Dec. 751, 555 N.E.2d 1270 (1990).

<sup>773</sup> DuChene vs. Fireman's Pension Fund, 184 Ill.App.3d 828, 540 N.E.2d 881, 133 Ill. Dec. 15 (1989).

<sup>774</sup> Board of Trustees of the Addison Fire Protection District No. 1 Pension Fund vs. Stamp, 241 Ill.App.3d 873, 608 N.E.2d 1274, 181 Ill. Dec. 800 (1993).

<sup>775</sup> Casteneda vs. Illinois Human Rights Commission, 132 Ill.2d 304, 547 N.E.2d 437, 138 Ill. Dec. 270 (1989).

exhaustion of remedies doctrine is usually required unless it can be shown that it would be futile to seek relief from the agency.<sup>776</sup>

## **2. §16.6        FINALITY OF ADMINISTRATIVE DECISIONS**

Closely connected with the exhaustion of remedies doctrine is the requirement that the agency's decision be final and subject to review. Thus, judicial review of a pension board decision can only occur when there has been a final agency determination, which usually follows some sort of hearing or fact-finding process. A pension board's preliminary motion and a decision to proceed to a hearing was not a final agency decision that was subject to judicial review.<sup>777</sup>

## **3. §16.7        PARTIES TO ADMINISTRATIVE PROCEEDINGS**

Under the Code of Civil Procedure, the pension board and all persons who were parties before the pension board are to be made defendants in an administrative review proceeding.<sup>778</sup> The plaintiff in an administrative review proceeding is usually the individual seeking pension benefits. The question becomes who are the proper defendants to an administrative review action? Obviously, the pension board is a proper defendant.<sup>779</sup> The municipality will also be a necessary party if it intervened or

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<sup>776</sup> Board of Trustees of Addison Fire Protection District No. 1 Pension Fund , *supra*.

<sup>777</sup> Jagielnik vs. Mundelein Police Pension Board, 211 Ill.App.3d 26, 569 N.E.2d 1293, 155 Ill. Dec. 682 (1991).

<sup>778</sup> 735 ILCS 5/3-107.

<sup>779</sup> See, Ryndak vs. River Grove Police Pension Board, 248 Ill.App.3d 486, 618 N.E.2d 606, 188 Ill. Dec. 36 (1993).

participated in the pension board proceeding.<sup>780</sup> One court has held that a dissenting trustee has no standing to file a complaint for administrative review.<sup>781</sup>

An administrative review action cannot be dismissed based on the failure to name an individual pension trustee as a defendant, as long as the pension board is named as a defendant.<sup>782</sup> A motion to dismiss can and should be filed on behalf of the individual pension board trustees in such cases, if they are named as individual defendants, along with pension board.

#### **4. §16.8      TIME FOR FILING THE COMPLAINT AND SUMMONS FOR ADMINISTRATIVE REVIEW**

A party seeking to review a decision of a pension board must file his complaint and summons within 35 days from the date that the decision sought to be reviewed was either delivered or mailed to that party.<sup>783</sup> When a decision is mailed, the 35 day time period runs from the date of mailing, not the date of receipt. Failure to seek judicial review within this 35 day time period constitutes untimely review and is subject to dismissal.<sup>784</sup> Thus, if a complaint for administrative review is filed even one day late, the pension board's decision is final and not subject to review. In order to advise pension fund members of this legal requirement, it is suggested that pension boards add the following language to each decision.

“YOU HAVE A RIGHT TO APPEAL THIS DECISION

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<sup>780</sup> Gualano vs. Des Plaines Firemen's Pension Fund, 139 Ill.App.3d 456, 487 N.E.2d 1050, 94 Ill. Dec. 173 (1985).

<sup>781</sup> Hadley vs. Batavia Firemen's Pension Fund, 113 Ill.App.3d 866, 447 N.E.2d 958, 69 Ill. Dec. 523 (1983).

<sup>782</sup> 735 ILCS 5/3-107.

<sup>783</sup> 735 ILCS 5/3-103.

<sup>784</sup> Johnson vs. Peoria Police Pension Fund, 228 Ill.App.3d 420, 592 N.E.2d 1149, 170 Ill.Dec. 469 (1993); Murphy vs. Policemen's Benefit Fund, 71 Ill.App.3d 556, 390 N.E.2d 45, 28 Ill.Dec. 63 (1979); Higgins vs. Board of Review, 10 Ill.App.3d 140, 294 N.E.2d 32 (1973); Varnes vs. Dougherty, 39 Ill.App.3d 476, 350 N.E.2d 6 (1976).

TO THE CIRCUIT COURT UNDER ARTICLE 3 OF THE ILLINOIS CODE OF CIVIL PROCEDURE, 735 ILCS 5/3-101. YOU MUST FILE WITHIN 35 DAYS FROM THE MAILING OF THIS DECISION”

The above language puts the affected party on notice as to the obligation to seek judicial review within 35 days. However, the Illinois Supreme Court has held that local governmental bodies such as pension boards, do not have any statutory obligation to advise affected parties of their obligations to file a complaint for administrative review within this time period.<sup>785</sup>

Before there is a right to review the pension board’s decision under the administrative review provisions, the board’s decision must be a final determination. A pension board’s decision not to dismiss a case and proceed to a hearing is only an interim ruling that was not subject to judicial review.<sup>786</sup>

One appellate court decision has also indicated that if a pension board seeks to modify or change its own decision, it must do so within the 35 day period under the Administrative Review Law.<sup>787</sup> This ruling puts pension boards under an extremely tight timetable as far as changing prior decisions. Under this case a pension board cannot hold a re-hearing after thirty-five days from the date of its initial decision. An administrative agency’s procedural rules may allow for the extension of the 35 day review period.<sup>788</sup>

## 5. **§16.9 SCOPE OF REVIEW**

In reviewing decisions of a pension board, the circuit court can determine and decide all questions of law and fact presented in the administrative record.<sup>789</sup> No new or additional evidence can be heard by the court. The reviewing court is bound by what is contained in the administrative record.<sup>790</sup>

There are four separate and distinct standards of judicial review of pension board decisions. The first standard is the manifest weight of the evidence standard, under which a pension board’s factual findings may only be reversed if they are contrary to the manifest weight of the evidence.<sup>791</sup> This is the common standard of review and is discussed in greater detail in the following section. When

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<sup>785</sup> Carver vs. Nall, 186 Ill.2d 554, 714 N.E.2d 486, 239 Ill.Dec. 567 (1999).

<sup>786</sup> Jagielnik vs. Mundelein Police Pension Board, 211 Ill.App.3d 26, 569 N.E.2d 1293, 155 Ill. Dec. 682 (1991).

<sup>787</sup> Rossler vs. Morton Grove Police Pension Board, 178 Ill.App.3d 769, 127 Ill. Dec. 845, 533 N.E.2d 927, 127 Ill. Dec. 845, (1989); Sola vs. Roselle Police Pension Board, 342 Ill.App.3d 227, 794 N.E.2d 1055, 276 Ill. Dec. 805 (2003).

<sup>788</sup> Sola, supra, 794 N.E.2d at 1057.

<sup>789</sup> 735 ILCS 5/3-110.

<sup>790</sup> Village of Western Springs vs. Pollution Control Board, 107 Ill.App.3d 864, 438 N.E.2d 458, 63 Ill. Dec. 527 (1982). This means that all issues on review in the court must first be raised before the pension board.

<sup>791</sup> Rhoads vs. Calumet City Police Pension Board, 293 Ill.App.3d 1070, 689 N.E.2d 266, 288 Ill. Dec. 394 (1997). (Rhoads I).

applying this standard, the findings and conclusions of the pension board on questions of fact are considered *prima facie* true and correct by the reviewing courts.<sup>792</sup>

The second standard of review deals with questions of law. A pension board's legal conclusions or statutory interpretations are not binding in the same way that its findings of fact are. While the courts should accord some weight to the interpretation of the law by the agency charged with carrying out the provisions of the statute,<sup>793</sup> they will overturn an erroneous interpretation of the law by a pension board.<sup>794</sup> This second method of review is known as *de novo* review.<sup>795</sup> It has been held that the questions of whether a specific act or job function rises to the level of an act of duty is a question of law, subject to a *de novo* standard of review.<sup>796</sup>

When a pension board's decision presents a mixed question of law and fact, a third standard applies. In such instances, the reviewing court will apply a clearly erroneous standard of review.<sup>797</sup> This standard accords some deference to the pension board's experience and expertise, some appellate courts have held that the question of whether a pension applicant initially qualifies for a disability pension involves an examination of the legal effect of a given set of facts.<sup>798</sup> However, the supreme court and a number of appellate courts have held that the question of whether a disability exists, or continues to exist is a question of fact subject to the manifest weight of the evidence standard of review.<sup>799</sup>

The fourth standard of review deals with the review of discretionary decisions of a pension board. In such cases, the board's decision will only be overturned if the board abuses its discretion.<sup>800</sup> A board abuses its discretion when it acts arbitrarily or capriciously.

The outcome of a particular case may depend upon the standard that the reviewing court applies.

**a. §16.10      MANIFEST WEIGHT OF  
THE EVIDENCE STANDARD**

<sup>792</sup> Kloss vs. Mundelein Board of Fire and Police Commissioners, 108 Ill.App.3d 9, 438 N.E.2d 685, 63 Ill Dec. 754 (1982); Wall vs. Schaumburg Police Pension Board, 178 Ill.App.3d 438, 533 N.E.2d 458, 127 Ill. Dec. 586 (1989).

<sup>793</sup> Golden Bear Family Restaurants vs. Murray, 144 Ill.App.3d 616, 494 N.E.2d 581, 98 Ill. Dec. 459 (1986).

<sup>794</sup> Moore vs. Sanitary District Trustees' Annuity and Pension Fund, 157 Ill.App.3d 158, 510 N.E.2d 87, 109 Ill. Dec. 466 (1987); Stec vs. Oak Park Police Pension Board, 204 Ill.App.3d 556, 561 N.E.2d 1234, 149 Ill.Dec. 538 (1990).

<sup>795</sup> Stillo vs. State Retirement System, 305 Ill.App.3d 1003, 714 N.E.2d 11, 239 Ill. Dec. 453 (1999).

<sup>796</sup> White vs. City of Aurora, 323 Ill.App.3d 733, 753 N.E.2d 1244, 257 Ill. Dec. 618 (2001).

<sup>797</sup> City of Belvedere vs. Illinois State Labor Relations Board, 181 Ill.2d 191, 692 N.E.2d 295, 229 Ill.Dec. 522 (1998).

<sup>798</sup> Virden vs. Board of Trustees of the Firefighters' Pension Fund of City of Pekin, 304 Ill.App.3d 330, 709 N.E.2d 986, 237 Ill. Dec. 517 (1999); Knight vs. Village of Bartlett, 338 Ill.App.3d 892, 788 N.E.2d 205, 272 Ill. Dec. 901 (2003).

<sup>799</sup> Marconi vs. Chicago Heights Police Pension Board, 225 Ill.2d 497, 870 N.E.2d 273, 312 Ill.Dec. 208 (2006); Antonelli vs. Hillside Police Pension Board, 287 Ill.App.3d 348, 678 N.E.2d 773, 222 Ill.Dec. 901 (1997); Daily vs. Board of Trustees of the Springfield Police Pension Fund, 251 Ill. App.3d 119, 621 N.E.2d 986, 190 Ill. Dec. 533 (1993); Wall vs. Schaumburg Police Pension Board, 178 Ill.App.3d 438, 533 N.E.2d 458, 127 Ill. Dec. 586 (1989).

<sup>800</sup> Village of Stickney vs. Police Pension Fund of Stickney, 374 Ill.App.3d 845, 807 N.E.2d 1078, 283 Ill. Dec. 237 (2004).

The manifest weight of the evidence standard of review is the one most frequently applied by the courts. The factual determinations of a pension board should be affirmed by the reviewing court unless the court finds that the decision is against the manifest weight of the evidence.<sup>801</sup> To reverse a pension board's decision as against the manifest weight of the evidence, a court must conclude that all reasonable and unbiased persons acting within the limits prescribed by law and drawing all inferences in support of the pension board's finding, would agree that the finding is erroneous and that an opposite conclusion is clearly evident.<sup>802</sup> It is not sufficient that there are mere conflicts in testimony or that an opposite conclusion might be reasonable.<sup>803</sup> There need only be some competent evidence in the record to support the agency's findings.<sup>804</sup> In order to reverse the administrative decision it must be found that an opposite conclusion is clearly evident.<sup>805</sup> It is not the function of the reviewing court to reweigh the evidence or determine the credibility of witnesses after an administrative decision has been rendered.<sup>806</sup>

The court, on administrative review, cannot hear new or additional evidence or make independent findings of fact.<sup>807</sup> Where it appears that there is evidence in the administrative record to support the decision, the pension board's decision should be affirmed.<sup>808</sup> The fact that the circuit court reviewing an agency's decision might have reached a different conclusion does not require reversal if the agency's decision is not against the manifest weight of the evidence.<sup>809</sup>

## **6.      §16.11      POWERS OF THE REVIEWING COURT**

The circuit court in reviewing a pension board's determination can do a number of things. The board's decision can be stayed, affirmed, reversed or remanded. The pension board cannot appeal from a remand.<sup>810</sup> Monetary judgments can also be entered.<sup>811</sup>

<sup>801</sup> Peterson vs. Board of Trustees, Des Plaines Firemen's Pension Fund, 54 Ill.2d 260, 296 N.E.2d 721 (1973); Hodges vs. Granite City Police Pension Board, 73 Ill.App.3d 978, 392 N.E.2d 417, 29 Ill. Dec. 460 (1979).

<sup>802</sup> Jackson vs. Department of Labor, 168 Ill.App.3d 494, 523 N.E.2d 5, 119 Ill. Dec. 537 (1988).

<sup>803</sup> Altman vs. Board of Fire and Police Commissioners, 110 Ill.App.3d 282, 442 N.E.2d 305, 66 Ill. Dec. 33 (1982); Knop vs. Department of Registration & Education, 96 Ill.App.3d 1067, 421 N.E.3d 1091, 52 Ill. Dec. 228 (1981).

<sup>804</sup> Abrahamson vs. Illinois Department of Professional Regulation, 153 Ill.2d 76, 606 N.E.2d 1111, 180 Ill. Dec. 34 (1992); Greene vs. Board of Election Commissioners, 112 Ill.App.3d 862, 445 N.E.2d 1337, 68 Ill.Dec. 484 (1983).

<sup>805</sup> Wolbach vs. Zoning Board of Appeals, 82 Ill.App.3d 288, 226 N.E.2d 679 (1967).

<sup>806</sup> Flynn vs. Board of Fire & Police Commissioners, 33 Ill.App.3d 394, 342 N.E.2d 298 (1969).

<sup>807</sup> Bruce vs. Department of Registration & Education, 26 Ill.2d 612, 187 N.E.2d 711 (1963).

<sup>808</sup> Feynes vs. State Employee's Retirement System, 17 Ill.2d 106, 160 N.E.2d 810 (1959).

<sup>809</sup> Zinser vs. Board of Police & Fire Commissioners, 28 Ill.App.2d 435, 172 N.E.2d 33 (1961).

<sup>810</sup> Friedland vs. Moline Police Pension Fund, 202 Ill.App.3d 797, 147 Ill. Dec. 455, 559 N.E.2d 795 (1990).

<sup>811</sup> 735 ILCS 5/3-111.

**E.           §16.12        PROCEDURE IN ADMINISTRATIVE**  
**REVIEW PROCEEDINGS**

The procedure in court cases involving judicial review of pension board proceedings can be briefly summarized as follows. The party seeking review must file a complaint for administrative review within 35 days.<sup>812</sup> The defendants usually are the pension board itself and any other parties at the administrative level.<sup>813</sup> The pension board files an answer consisting of the complete administrative record.<sup>814</sup> The pension board can file a certified copy of the administrative record rather than filing the original record.<sup>815</sup> After the administrative record is filed, the parties usually file legal memoranda in support of their respective positions. A hearing is then held and the court renders its decision. An adverse decision of the circuit court can be appealed to the appellate court.<sup>816</sup>

**F.           §16.13        LEGAL ACTIONS BY PENSION BOARDS**

Pension boards can also institute legal action. Such suits are usually brought by the pension board seeking various forms of declaratory or injunctive relief.<sup>817</sup> The pension board can also bring an action to collect pension contributions from the municipality.<sup>818</sup> One court has allowed a pension board to sue the municipality in order to enforce payment of pension benefits that were awarded by the board.<sup>819</sup>

**G.           §16.14        RES JUDICATA AND ESTOPPEL**

Often, when pension boards are involved in litigation, the opposing party attempts to invoke certain legal doctrines such as estoppel<sup>820</sup> or *res judicata*.<sup>821</sup> Appellate court cases have applied the doctrine *res judicata* to reverse a pension board's denial of a duty related disability based upon a

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<sup>812</sup> 735 ILCS 5/3-103.

<sup>813</sup> 735 ILCS 5/3-107; Nelson vs. Springfield Police Pension Fund, 141 Ill.App.3d 411, 490 N.E.2d 216, 95 Ill.Dec. 743 (1986).

<sup>814</sup> 735 ILCS 5/3-106.

<sup>815</sup> 735 ILCS 5/3-108.

<sup>816</sup> 735 ILCS 5/3-112.

<sup>817</sup> Barrington Police Pension Board vs. Department of Insurance, 211 Ill.App.3d 698, 570 N.E.2d 622, 156 Ill. Dec. 146 (1991); Park Ridge Firemen's Pension Fund vs. Department of Insurance, 109 Ill.App.3d 919, 441 N.E.2d 107, 65 Ill. Dec. 315 (1982); Urbana Police Pension Board vs. Illinois Human Rights Commission, 141 Ill. App.3d 447, 490 N.E.2d 232, 95 Ill. Dec. 759 (1986); Rockford Police Pension Fund vs. City of Rockford, 96 Ill.App.3d 102, 420 N.E.2d 1126, 51 Ill. Dec. 568 (1981); Oak Brook Police Pension Fund vs. Department of Insurance, 42 Ill.App.3d 155, 356 N.E.2d 171, 1 Ill. Dec. 171 (1976).

<sup>818</sup> Evanston Police Pension Fund vs. City of Evanston, 231 Ill.App.3d 1047, 667 N.E.2d 657, 217 Ill. Dec. 568 (1996).

<sup>819</sup> Morris vs. Harper, 393 Ill.App.3d 624, 912 N.E.2d 1288, 332 Ill.Dec. 402 (2009).

<sup>820</sup> Governmental estoppel is the claim by a party that he was induced by the conduct of certain governmental officers and as a result of such inducement he has suffered substantial loss. City of El Paso vs. Hoogland, 224 Ill. 263, 79 N.E. 658 (1955).

<sup>821</sup> Res Judicata means that an issue once adjudicated shall be considered as finally settled and conclusive on the parties. Rose vs. Dolejs, 7 Ill. App.2d 267, 129 N.E.2d 281 (1955).

previous workers compensation decision which arose out of and in the course of employment.<sup>822</sup> However, other better reasoned cases have held that the doctrine of *res judicata* does not apply between pension board decisions and workers' compensation proceedings because the parties are not the same,<sup>823</sup> or the issues are not the same.<sup>824</sup> It has been held that a decision in workers' compensation cases that a police officer's injury arose out of his employment, collaterally estopped the municipality from relitigating the issue of causality in the police officer's action under the Public Employee Disability Act (PEDA).<sup>825</sup>

#### H.           §16.15       PRECLUSION OF OTHER REMEDIES

A pension board that denies a disability pension or denies a person admission into the pension fund cannot be sued for discrimination under Illinois law.<sup>826</sup> The appellate court has also recently ruled that a suit challenging the reduction of a widow's annuity on the grounds of impermissible age discrimination was not timely filed because the pension reduction took place in 1978 and the suit was not filed until 1986.<sup>827</sup>

The federal district court dismissed a claim filed under 42 U.S.C. §1983 against a pension board alleging a constitutional violation of procedural due process of law as a result of the pension benefits being reduced by amounts received in a workers' compensation award.<sup>828</sup> The court ruled in that case that procedural due process of law was satisfied by the judicial review procedures contained in the Illinois Administrative Law.

The Illinois Supreme Court has held that the provisions of the Pension Code<sup>829</sup> prohibiting a lawsuit against the municipality for injuries sustained by the police officer, also prevents the officer from suing a co-employee under a negligence theory for injuries.<sup>830</sup>

#### I.           §16.16       DISABILITY DETERMINATIONS AND DISCHARGE

<sup>822</sup> Village of Winnetka vs. Illinois Industrial Commission, 232 Ill.App.3d 351, 597 N.E.2d 630, 173 Ill. Dec. 656 (1992); Dempsey vs. City of Harrisburg, 3 Ill.App.3d 696, 279 N.E.2d 55 (1971).

<sup>823</sup> Rhoads vs. Calumet City Police Pension Board, 293 Ill.App.3d 1070, 689 N.E.2d 266, 288 Ill. Dec. 394 (1997); Hannigan vs. Hoffmeister, 240 Ill.App.3d 1065, 608 N.E.2d 396, 181 Ill.Dec. 323 (1992).

<sup>824</sup> Demski vs. Mundelein Police Pension Board, 358, Ill.App.3d 499, 831 N.E.2d 704, 294 Ill.Dec. 754 (2005).

<sup>825</sup> Mabie vs. Village of Schaumburg, 364 Ill.App.3d 756, 847 N.E.2d 796 301 Ill.Dec. 786 (2006).

<sup>826</sup> Urbana Police Pension Fund vs. Illinois Human Rights Commission, 141 Ill.App.3d 447, 490 N.E.2d 232, 95 Ill.Dec. 759 (1986).

<sup>827</sup> Kozak vs. Retirement Board, 170 Ill.App.3d 1083, 524 N.E.2d 1049, 121 Ill.Dec. 1 (1988).

<sup>828</sup> Schroeder vs. Morton Grove Police Pension Board, 88 C 9719 (N.D. Ill. 1989).

<sup>829</sup> 40 ILCS 5/22-307.

<sup>830</sup> Mitsuuchi vs. City of Chicago, 125 Ill.2d 489, 532 N.E.2d 830, 127 Ill. Dec. 1 (1988).

One area of continuing judicial review and litigation concerns the connection between a pension board's grant, denial or revocation of a disability pension to a police officer and the municipality's ability to discharge that individual. A police officer who files for a disability pension under Article 3 is merely separated from service. He or she is not terminated.<sup>831</sup> If a police officer receiving a disability pension is found by the board to have recovered, the pension board certifies to the chief of police that the officer is no longer disabled and is able to return to duty.<sup>832</sup> In one case, the appellate court upheld the reinstatement of a police officer back to active duty after the pension board certified that the officer was no longer disabled.<sup>833</sup> The plaintiff in that case argued that a clause in the collective bargaining agreement mandating termination for an absence of 365 days or more was not enforceable because it was contrary to the provisions of the Fire and Police Commission Act which sets forth the procedure for discharge.<sup>834</sup> The appellate court agreed.

What happens if a pension recipient is terminated after he or she has filed for a disability pension? Termination or resignation after filing an application for a disability pension does not bar the right to receive the pension.<sup>835</sup> However, discharge or resignation prior to filing the disability application does bar the receipt of a pension.<sup>836</sup>

If a pension recipient is discharged after filing for, or receiving a disability pension and is then found by the pension board to be fit for duty, the pension can be terminated even though the individual will not be reinstated.<sup>837</sup> The discharge precludes the possibility of reinstatement.<sup>838</sup> Under these cases, if there is a termination and a subsequent finding that the pension beneficiary is no longer disabled, the pension board's only function is to decide whether or not the disability pension should be terminated. The board has no jurisdiction or authority to determine the issue of reinstatement to service as a police officer.

The decision of a pension board denying a police officer's application for a disability pension does not preclude the municipality from terminating the officer because he or she is physically unable to perform the duties of a police officer.<sup>839</sup> In one case, a firefighter applied for a disability pension, which the pension board denied. He returned to work as a firefighter but an incident occurred in which the firefighter experienced pain and loss of grip strength while carrying a stretcher, nearly causing him to drop it. The firefighter was then sent home and charges were brought before the Board

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<sup>831</sup> 40 ILCS 5/3-116.

<sup>832</sup> *Id.*

<sup>833</sup> Parisi vs. Jenkins, 236 Ill.App.3d 42, 603 N.E.2d 566, 177 Ill.Dec. 496 (1992).

<sup>834</sup> Parisi, *supra* 603 N.E.2d at 573.

<sup>835</sup> Stec vs. Oak Park Police Pension Board, 204 Ill.App.3d 556, 561 N.E.2d 1234, 149 Ill.Dec. 538 (1990).

<sup>836</sup> Di Falco vs. Board of Trustees of the Firemen's Pension Fund of Wood Dale, 122 Ill.2d 22, 521 N.E.2d 923, 118 Ill. Dec. 446 (1988).

<sup>837</sup> Rhoads vs. Board of Trustees of the Calumet City Policemen's Pension Fund, 348 Ill.App.3d 835, 810 N.E.2d 573, 284 N.E.2d 573 (2004); Grennan vs. Board of Trustees of the Police Pension Fund, 213 Ill.App. 3d 179, 573 N.E.2d 825, 158 Ill. Dec. 12 (1991).

<sup>838</sup> Freberg vs. Board of Trustees of the Firemen's Pension Fund, 128 Ill.App.2d 369, 262 N.E.2d 22 (1970).

<sup>839</sup> Dowrick vs. Village of Downers Grove, 362 Ill.App.3d 512, 840 N.E.2d 785, 298 Ill. Dec. 672 (2005).

of Fire and Police Commissioners seeking his discharge. The Board of Commissioners found that the firefighter was unwilling and unfit to perform the job of a full-time firefighter. On appeal, the firefighter argued that since the pension board concluded that he was not disabled, he could not be terminated as being unfit for duty. The appellate court disagreed, holding that the firefighters' physical condition and his ability to perform his job could have deteriorated after the pension board reached its decision.<sup>840</sup> The reviewing court also held that there was no identity of parties for purposes of *res judicata*.<sup>841</sup> Finally, the appellate court ruled that the Illinois legislature could deliberately set the standard lower for a municipality seeking to discharge an unfit firefighter than for a firefighter to obtain a disability pension.<sup>842</sup> Thus, under this case, a firefighter or police officer can be denied a disability pension as being able to perform his or her duties, yet be discharged for being unfit for duty.

Although a pension board's denial of a disability pension does not preclude discharge of the pension applicant, a board's determination that an individual is disabled for pension purposes can affect the municipality's power to discharge.<sup>843</sup> In a recent case, a police officer with a pending duty disability pension application was brought up on charges before the board of fire & police commission. The commission ordered the firefighter discharged for cause. Subsequently, the pension board granted the police officer a duty-related disability pension under section 3-110. Following an Illinois Supreme Court precedent decided under Article 5 of the Pension Code,<sup>844</sup> the reviewing court held that the pension grant of a duty disability pension precluded the commission from terminating the police officer based on misconduct that was substantially related to the psychiatric problems that formed the basis for the disability pension.<sup>845</sup> The holding of this case is a police officer cannot be discharged for misconduct that is substantially related to a psychiatric condition that was the basis of a disability pension award. The case was remanded for further proceedings to determine whether a lesser sanction might be appropriate. The lesson to be garnered from these cases is if the misconduct that was the basis for charges before the board of fire and police commissioners is substantially related to the medical condition giving rise to the granting of a disability pension by the pension board, the proper sanction is something less than discharge for cause.<sup>846</sup>

#### J. **§16.17 ATTORNEYS FEES**

One issue that often arises in any litigation is who is going to pay the attorneys. The general rule of law in the United States is that a prevailing party in litigation may not collect attorneys fees unless there is statutory authority, contractual authority or the existence of a common fund.<sup>847</sup> There is

<sup>840</sup> Dowrick, supra, 840 N.E.2d at 791.

<sup>841</sup> Id. 840 N.E.2d at 793.

<sup>842</sup> Id. 840 N.E.2d at 794.

<sup>843</sup> Lynch vs. City of Waukegan, 363 Ill.App.3d 1078, 845 N.E.2d 911, 301 Ill. Dec. 46 (2006).

<sup>844</sup> Walsh vs. Board of Fire & Police Commissioners, 96 Ill.2d 101, 449 N.E.2d 115, 70 Ill. Dec. 241(1983).

<sup>845</sup> Lynch, supra, 845 N.E.2d at 918.

<sup>846</sup> Walsh vs. Board of Fire and Police Commissioners, 96 Ill.2d 101, 449 N.E.2d 115, 70 Ill.Dec. 241 (1983).

<sup>847</sup> Alyeska Pipeline Service Co. vs. Wilderness Society, 421 U.S.240 (1975); Fiorito vs. Jones, 72 Ill.2d 73, 377 N.E.2d 1019, 18 Ill.Dec. 383 (1978).

no provision in Article 3 of the Pension Code that allows a prevailing party to collect attorneys fees from a pension board.

Two reported cases have involved situations where individuals attempted to have their own attorneys fees paid by the pension board. Neither case met with success. In one case, a pension participant who prevailed against his pension board in an administrative review action was denied attorneys fees since he was not an employee of pension fund and he was the defending party.<sup>848</sup> In the second case, an attorney who obtained a workers compensation award for a pension beneficiary which entitled the pension fund to a reduction disability of the disability pension being paid to the beneficiary brought suit against the pension fund to collect attorneys fees under an “equitable fund” doctrine. The appellate court dismissed the claim for attorneys fees on procedural grounds.<sup>849</sup> However, one case has recently granted attorneys fees against a state pension system under the common-fund doctrine.<sup>850</sup> Attorneys fees were awarded in favor of a number of pension boards and against the Department of Insurance where the plaintiff boards were successful in overturning a Department rule requiring a mandatory automated clearing house payment of annual compliance fees.<sup>851</sup>

#### **K.            §16.17        PRE-JUDGMENT INTEREST**

It is now the law that a pension board is not required to pay prejudgment interest when the board in good faith denies a claim for disability benefits and that decision is later reversed on administrative review.<sup>852</sup>

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<sup>848</sup> Cooper vs. River Forest Firemen’s Pension Fund, 157 Ill.App.3d 944, 510 N.E.2d 1222 (1987).

<sup>849</sup> Taylor vs. State Universities Retirement System, 159 Ill.App.3d 372, 512 N.E.2d 399, 111 Ill. Dec. 283 (1987). (Taylor I).

<sup>850</sup> Taylor vs. State Universities Retirement System, 203 Ill.App.3d 513, 560 N.E.2d 893, 148 Ill. Dec. 296 (1990). (Taylor II).

<sup>851</sup> Chicago Heights Police Pension Board, et al vs. Illinois Department of Insurance, 323 Ill.App.3d 912, 783 N.E.2d 343, 257 Ill.Dec. 148 (2001).

<sup>852</sup> Kouzoukas vs. Retirement Board, 234 Ill.2d 446, 917 N.E.2d 999, 334 Ill.Dec. 924 (2009).

## **CHAPTER 17**

### **TRUSTEE TRAINING AND ETHICS**

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**CHAPTER 17**

**TRUSTEE TRAINING AND ETHICS**

**A.           §17.1        INTRODUCTION**

A pension has been defined as an allowance paid out of the public treasury to individuals or their representatives based upon valuable and meritorious services rendered or the satisfaction of certain conditions, such as age, years of service, or loss sustained while in public service.<sup>853</sup> In order to ensure that Article 3 police pension funds are properly managed and that police officers and their family members receive the benefits they are entitled to, the Pension Code has established a five member board of trustees.<sup>854</sup> In Illinois, public pension trustees can be compared with the CEO's of large corporations. Like corporate CEOs, pension trustees control and are responsible for millions of dollars of assets. Many people, particularly participants and beneficiaries, depend upon pension board trustees as a source of their financial well-being and to ensure that pension benefits will be available when an individual retires.

**B.           §17.2        STATUTORY PROHIBITIONS**

The provisions of the Illinois Pension Code, specifically Articles 1, 1A and 3, provide starting points for complying with the ethical standards imposed upon police pension trustees. The Pension Code specifically forbids pension trustees from entering into certain transactions, known as prohibited transactions.<sup>855</sup> The prohibited transactions specified in Article 1 are discussed in detail in Chapter 6.

**C.           §17.3        TRUSTEE TRAINING REQUIREMENTS**

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<sup>853</sup> Patterson vs. City of Granite City, 78 Ill.App.3d 821, 398 N.E.2d 237 (1979).

<sup>854</sup> 40 ILCS 5/3-128.

<sup>855</sup> 40 ILCS 5/1-110.

Obviously, for a pension trustee to adequately perform his or her pension board functions, and to be protected from liability, a pension trustee must know a great deal about the Pension Code and other related laws. Thus, pension trustee education is of paramount importance. Each pension board is required to annually certify to the Department of Insurance that its trustees have complied with the annual training requirements established under the Pension Code.<sup>856</sup> The pension board has the discretion to establish what subject matter and curriculum it deems important for its individual trustees, subject to certain mandatory training requirements set forth in the Pension Code.<sup>857</sup>

#### **1. §17.4        ETHICS TRAINING**

The Pension Code mandates that all pension trustees must attend some form of ethics training of at least eight (8) hours per year.<sup>858</sup> This ethical training can also include subjects such as fiduciary duties and responsibilities, investment issues, and other related subject matter that the pension board deems important.

#### **2. §17.5        PENSION BOARD TRUSTEES SERVING WHEN THE TRAINING AMENDMENTS WENT INTO EFFECT**

Police pension trustees who were serving on pension boards when the statutory training requirements went into effect on August 13, 2009 are required to have sixteen hours of trustee training annually.<sup>859</sup>

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<sup>856</sup> 40 ILCS 5/1-113.18.

<sup>857</sup> *Id.*

<sup>858</sup> *Id.*

<sup>859</sup> 40 ILCS 5/1-109.3(b).

An excellent way for any pension trustee to fulfill these training requirements is to attend the IPPFA's Annual Training Conference or to attend the many seminars that the IPPFA provides. A pension board can also develop its own training programs for its trustees.

**3. §17.6 NEW TRUSTEES**

The training requirements under the Pension Code also mandate that each new trustee who serves on the board after the effective date of the pension training amendments<sup>860</sup> must receive thirty-two hours of training from a certified institution.<sup>861</sup>

**D. §17.7 TRUSTEE ETHICAL STANDARDS**

Much has been said and published in the media concerning Illinois public pension funds. However, the current financial state of police and firefighter pension funds has nothing to do with how these funds have been administered by their trustees.

In order to ensure that police pension trustees act in an ethical manner in performing his or her duties, the following standards should be kept in mind.

**1. §17.8 ACTING IN GOOD DAITH AND  
IN THE BEST INTEREST OF FUND  
PARTICIPANTS AND BENEFICIARIES**

A pension board trustee is required to act in the **exclusive** interest of the pension fund's participants and beneficiaries.<sup>862</sup> An individual serving on a pension board only wears one hat – that of a pension trustee. The interests of the municipality, the police or fire department or the union are subservient to the interests of the pension fund and its participants and beneficiaries.

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<sup>860</sup> 40 ILCS 5/1-109.3(a).

<sup>861</sup> 40 ILCS 5/1-109.3.

<sup>862</sup> 40 ILCS 5/1-109.

When dealing with the payment of pension benefits, pension trustees must put aside any likes of dislikes or any personal feelings towards the pension applicant. A pension should not be granted solely because someone is a great guy or a good firefighter or police officer. The only consideration should be whether the applicant is statutorily entitled to the pension benefit.

To a certain extent, the adjudication of a pension claim presents an ethical dilemma for pension trustees. On one hand, the trustees must fairly adjudicate the pension claim and grant the pension if eligibility is shown. On the other hand, the granting of the pension works to the detriment of the other participants and beneficiaries because pension fund assets are reduced.

## **2. §17.9        ACTING WITH REASONABLE CARE**

The Pension Code requires that a pension trustee act “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity would use.”<sup>863</sup> The prudence standard is that of a reasonable person, not that of a prudent expert.

The Pension Code’s prudence standard requires a pension trustee to act with the care and skill of one “familiar with such matters.” Given this standard, it is advisable for trustees to retain legal, financial and investment experts to guide them in their technical decisions. Just as the retention of an expert may contribute to the conclusion that a fiduciary acted prudently, the failure to retain an appropriate expert may contribute to a court’s conclusion that the trustee’s conduct was imprudent. The fact that an expert is retained does not excuse a trustee from acting prudently. A trustee must act reasonably and use common sense in evaluating the advice

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<sup>863</sup> 40 ILCS 5/1-109(b).

received from the pension board's experts. One factor that the courts may take into account in evaluating prudence, regardless of whether experts are hired, is whether the pension board's trustees understand their fiduciary duties.<sup>864</sup>

### **3. §17.10 ACTING WITH COMPETENCE AND DILIGENCE**

Closely connected to the prudence standard is the requirement that a trustee act with skill, competence and diligence. A trustee cannot blindly accept the opinion of an expert without investigating and determining that the expert's opinion and advice are reasonable. If the pension board's financial advisor renders an opinion that it is permissible to take pension fund money and gamble it at the local casino, a competent pension trustee would not follow such advice. A competent trustee would fire that financial adviser!

Diligence requires that a trustee make an informed judgment as to each and every pension board decision. One federal case has held that a pension trustee did not act diligently when he failed to read an insurance policy that he signed on behalf of the pension fund and simply took the word of the seller of the policy.<sup>865</sup>

### **4. §17.11 ACTING TO AVOID CONFLICTS OF INTEREST**

A pension trustee must act independently and objectively. You must "call them as you see them." If a pension trustee's relative is applying to be the pension board's financial adviser, the trustee should refrain from taking part in the hiring decision.

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<sup>864</sup> See, Gregg vs. Transportation Workers of America, 343 F.3d 833 (6th Cir. 2003).

<sup>865</sup> Gregg, supra.

Although certain actions taken by a pension trustee may violate the prohibited transactions provisions, nothing in the law prohibits a pension trustee from receiving any benefits to which the trustee may be entitled to as a participant or beneficiary of the pension fund, or a trustee from receiving any reimbursement of expenses incurred in the performance of his or her duties as a pension trustee.<sup>866</sup>

The fact that a pension trustee is an official or employee of the municipality or a union official representing employers of the municipality does not preclude that individual from serving as a pension trustee.<sup>867</sup> However, that individual must act solely in the interests of the pension fund.

Often, in pension application proceedings, the applicant will move to disqualify one or more of the pension trustees by claiming bias or prejudice. Under the law, administrative officials are presumed to be objective and capable of fairly judging a particular controversy. In order to show bias, the applicant must prove that members of the pension board had, to some extent, adjudged the facts as well as the law of the case in advance of hearing it.<sup>868</sup> If a trustee is accused of being biased, the trustee needs to ask himself or herself the question: can I be fair and impartial? If the answer to that question is yes, the trustee is not subject to recusal. On the other hand, if a trustee knows he cannot be fair, he should recuse himself.

## **5.     §17.12       ACTING TO AVOID OUTSIDE INFLUENCE**

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<sup>866</sup> 40 ILCS 5/1-110(c).

<sup>867</sup> Coyne vs. Milan Police Pension Board, 347 Ill.App.3d 713, 807 N.E.2d 1276 (2004) (municipality's village clerk was not disqualified from hearing a disability pension claim).

<sup>868</sup> Turcol vs. Pension Board of Trustees of the Matteson Police Pension Fund, 359 Ill.3d 795, 834 N.E.2d 490, 295 Ill.Dec. 909 (2005).

The decisions made by pension board trustees should not be influenced by outside interests or sources. By virtue of the Gift Ban Act,<sup>869</sup> public officials cannot solicit or accept any gift from a prohibited source. This ban applies to the spouse and immediate family member living with the official. An individual does not violate the Gift Ban Act if he or she promptly takes action to return a gift or gives the gift or an amount equal to its value to an appropriate charity that is exempt from income taxation.<sup>870</sup>

There are a number of exceptions to the Gift Ban Act. Among these are:

- (A) Benefits and services that are available on the same conditions to the general public;
- (B) Educational materials;
- (C) Travel expense for official business;
- (D) Anything provided by an individual on the basis of personal friendship;
- (E) Food or refreshments not exceeding \$75 per person on a single calendar day;
- (F) Any item from a source during any calendar year having a total cumulative value of less than \$100.00.<sup>871</sup>

Trustees also need to avoid the appearance of impropriety. All actions taken by the pension board should be well documented. If a trustee knows that he or she cannot be impartial as to any given decision, that trustee should not take part in that decision.

## **6. §17.13 ACTING FAIRLY AND IMPARTIALLY**

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<sup>869</sup> 5 ILCS 430/10-10.

<sup>870</sup> 5 ILCS 430/10-30.

<sup>871</sup> 5 ILCS 430/10-15.

Trustees must be fair and impartial. When it comes to pension decisions, pension board trustees must decide the case based solely on the evidence presented, disregarding all outside factors. In making pension decisions, the board functions much like a jury. There should be no “off the record” decisions among trustees as to the merits of any pension application. Pension trustees should not conduct any personal investigations as to any pension claim. If a trustee feels that any additional investigation is required, the trustee should bring this to the attention of the pension board’s attorney and let the attorney initiate the investigation.

One case has specifically held that pension trustees cannot conduct independent investigations of a pension claim because they are members of the decision-making body.<sup>872</sup> In that case, two of the pension board’s trustees discussed the case among themselves and questioned witnesses on their own. The appellate court ruled that this was improper.

Trustees should also strive to deal with pension claims and inquiries in a timely manner. Justice delayed is often justice denied. However, pension decisions should not be made hastily. There should be a full and complete investigation and thorough fact-finding before any pension decision is made.

In deciding pension disability claims there is no time period within which a pension board has to make a decision. The Illinois Supreme Court has held that the time required before a well-reasoned and sound decision can be made will vary widely on a case-by-case basis.<sup>873</sup> In that case, the court held that a five year period of time to render a decision on a disability application was not unreasonable under the circumstances and did not violate due process.

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<sup>872</sup> Polk vs. Board of Trustees of the Park Ridge Police Pension Fund, 253 Ill.App.3d 525, 624 N.E.2d 1366 (1993).

<sup>873</sup> Marconi vs. Chicago Heights Police Pension Board, 225 Ill.2d 497, 870 N.E.2d 273, 312 Ill.Dec. 208 (2006).

**7. §17.14      ACTING CONSISTENTLY WITH  
THE GOALS AND POLICIES OF  
THE PENSION BOARD**

Pension board decisions should always be consistent and in conformance with the Pension Code and the board's policies and past practices. Pension board trustees must be aware that its prior decisions create a precedent. A pension board cannot grant a pension benefit to one applicant and then deny the pension to another applicant based on the same set of facts.

One way to ensure uniform pension board action and decision-making is for the board to adopt a comprehensive set of rules and regulations. In fact, the state regulator, Illinois Department of Insurance, encourages police and firefighter pension boards to adopt rules and regulations and the Pension Code specifically gives such pension boards that authority.<sup>874</sup> The adoption of any rules must be consistent with the applicable provisions of the Illinois Pension Code.

**8. §17.15      ACTING TO REGULARLY ASSESS THE  
PERFORMANCE OF SERVICE PROVIDERS**

Pension boards need to meet on a regular basis and the actions taken at such meetings should be well documented. If immediate action needs to be taken, a special meeting should be called. The board should not delay such action until the next regularly scheduled meeting. The board should also periodically assess its goals, especially the performance of its investments.

The board also needs to evaluate various experts that it has retained, such as its investment managers, attorneys actuaries, and accountants. If an investment manager is under performing as to investment return, that investment manager should be replaced. The board

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<sup>874</sup> See, 40 ILCS 5/3-140; 40 ILCS 5/4-126.

also needs to scrutinize the billing practices of its service providers in order to sure that the board is not being over-charged.

#### **9. §17.16      RETAINING COMPETENT AND QUALIFIED EXPERTS AND SERVICE PROVIDERS**

Pension trustees need help from various experts in the administration of the pension fund. These experts include qualified attorneys, investment advisers, accountants, actuaries, examining physicians, and private investigators. Once such experts have been retained, pension trustees should utilize their services. A pension trustee cannot blindly accept expert advice and opinions. Although due care on the part of a pension trustee will often demand the taking of advice from attorneys, appraisers, investment advisers, and others, the fact that such advice was obtained does not, in itself, show that the trustee utilized requisite caution. The trustee may be guilty of lack of ordinary judgment in verifying all of the advice obtained.<sup>875</sup> In other words, if you know the advice is bad, don't follow it. If you question the advice, seek a second opinion.

Trustees should also require their experts to advise them in language that can be understood by ordinary individuals.

#### **10. §17.17      BEING AWARE OF LEGAL OBLIGATIONS**

Trustees do not have to know the law as well as attorneys do. However, they need to know what is generally required of them under the Pension Code as well as the Open Meetings Act, the Freedom of Information Act, and the Gift Ban Act. Under Illinois law, pension trustees must also file statements of economic interests.<sup>876</sup>

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<sup>875</sup> Barrington Police Pension Board vs. Illinois Department of Insurance, 211 Ill.App.3d 698, 570 N.E.2d 622, 156 Ill.Dec. 146 (1991).

<sup>876</sup> 5 ILCS 420/4A-103.

In addition, pension trustees need to be aware of their continuing legal education requirements. All pension trustees must have at least 16 hours of continuing education each year, with 8 hours of ethics training per year. New trustees must participate in a mandatory trustee certification training seminar consisting of 32 hours.

**E.           §17.18       CONCLUSION**

The vast majority of pension board trustees want to perform their jobs in the best manner possible and act ethically. Following the above rules will help trustees to achieve these goals.

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