

## Appellate Update

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### **Police Surviving Spouses Are Not Entitled to COLAs**

*Village of Roselle v. Roselle Police Pension Board*, 2008 WL 2134134 (2d Dist. May 19, 2008). Before Officer Gurke died he was awarded annual 3% cost of living adjustments (“COLA”). After Officer Gurke died, the Board held a hearing to decide whether his widow, Bonnie, should continue to receive the annual 3% COLA. The Village was granted permission to participate in the hearing. After hearing evidence and argument the Board granted Bonnie the 3% annual COLA. The Village sought administrative review by the DuPage County Circuit Court. The circuit court overturned the Board’s decision. The Board then appealed to the Second District Court of Appeals. The appellate court held surviving spouses are not entitled to COLAs. The Roselle Police Pension Board has filed its petition for leave to appeal with the Illinois Supreme Court and is awaiting that Court to decide whether it will hear the case.

### **Correcting a Mistake By a Pension Board – Court Clarifies *Rosler & Sola***

*Fields v. Schaumburg Firefighters’ Pension Board*,

In *Fields*, a village employee erroneously determined that a 15 percent increase in the pensioner’s benefits that was implemented in 2002 should have been implemented in 1992. This miscalculation resulted in a 43 percent increase in the pensioner’s monthly pension check and the issuance in January 2003 of a sizeable lump sum check as back pay for pension benefits that the pensioner was not legitimately entitled to receive. The village also sent a letter to the pensioner that explained his increase in pension benefits. The village discovered the mistake approximately six months later. Subsequently, the village’s finance director sent a letter to the pensioner that explained the mistake and requested repayment of the lump sum check. The pensioner refused and argued that the pension board made a final administrative decision in January 2003 when the village issued the pensioner a pension check and sent the pensioner a letter. The Court held that “errors in calculation that resulted in overpayments” are not an award of pension benefits or a final administrative decision. The applicable issue in *Fields* was whether the payment of a pension check in the incorrect amount qualifies as a final administrative decision that would trigger the 35-day review period under 735 ILCS 5/3-103. The court held payment of a pension benefit does not constitute a final administrative decision. *Fields* specifically held *Sola* **does not** stand “for the proposition that a pension payment alone is evidence of a pension board’s decision to award a certain amount of benefits.”

### **“Act of Duty” Clarified**

*Sarkis v. City of Des Plaines*, 378 Ill.App.3d 833 (1st Dist. Feb. 8, 2008). Officer Sarkis injured his shoulder while lifting a malfunctioning railroad crossing gate. The Des Plaines Police Pension Board denied Sarkis a line-of-duty disability pension. On administrative review, the trial court held the raising of the crossing gate constituted an “act of duty.” The appellate court affirmed that decision. “We conclude that physically raising a railroad crossing gate is not an act performed by an ordinary person in his or her typical day, even in the unique circumstance of this case.”

*Merlo v. Orland Hills Police Pension Board*, 2008 WL 2331615 (1st Dist. June 4, 2008). Some vandals had stacked parking blocks in a community center parking lot. Officer Merlo was dispatched to the scene. While attempting to move the blocks, Merlo injured his back. The Orland Hills Police Pension Board awarded Merlo a not-on-duty disability pension. The Board reasoned, because Merlo was not performing an “act of duty” he was not entitled to a line-of-duty disability pension. On administrative review, the Board’s decision was overturned. The Board appealed. The appellate court upheld the trial court’s decision to award Merlo a line-of-duty disability pension. The Board argued, in part, Merlo was not injured while performing an “act of duty” because the department of public works, a civilian office, was responsible for moving the blocks. The court dismissed this argument. The court explained, “The village public works department may be duty bound to move concrete parking blocks; however, the employees of that department are not required to respond to a citizen’s call to confront mischievous juveniles or immediately eliminate the resulting safety hazards to the general public. The petitioner’s acts were that of a police officer responding to a civilian call; trying to immediately eliminate a public safety hazard.” As such, the court held Merlo was injured while performing an “act of duty.”

### **PSEBA – Defining “unlawful act”**

*Senese v. Village of Buffalo Grove*, 2008 WL 2358729 (2d Dist. June 5, 2008). Officer Senese was awarded a line-of-duty disability pension for injuries he suffered when he was struck by another vehicle while sitting in his squad car “monitoring traffic.” The district court followed the Illinois Supreme Court’s definition of “catastrophic injury” that was announced in *Krohe v. City of Bloomington*, 204 Ill.2d 392 (2003). The *Krohe* court held a catastrophic injury is one entitling a police officer or firefighter to a line-of-duty pension. The Village conceded Officer Senese was “catastrophically injured.”

However, the Village argued Officer Senese was not entitled to PSEBA benefits because he was not injured as a result of an “unlawful act.” Relying on *Blacks Law Dictionary* (8<sup>th</sup> ed. 2004), the court held, “unlawful act” means, “conduct that is not authorized by law; a violation of civil or criminal law.” The court held Senese was injured by an unlawful act because “the motorist [who struck Officer Senese] was cited for driving with an obstructed windshield and failing to reduce speed to avoid a collision” in violation of the Illinois Motor Vehicle Code. The court also rejected the Village’s argument that to qualify for PSEBA benefits a police officer or firefighter must prove a level of risk higher than the “special risk” required to receive line-of-duty pension benefits.

### **PEDA/PSEBA – One Injury One Benefit Rule and Attorney’s Fees**

*Bahr v. Bartlett Fire Protection District*, 2008 WL 2228846 (1st Dist. May 28, 2008). On September 10, 2000, Firefighter Bahr was injured while removing a stove from a garage fire. Three days later, on September 13, 2000, Bahr was injured while lifting a patient into an ambulance. Pursuant to the Public Employees Disability Act (“PEDA”) Bahr was paid his full salary from September 13, 2000 through his return to work on March 19, 2001 (approximately six (6) months). On June 5, 2003, Bahr was injured while removing an oxygen tank from an ambulance. From June 5, 2003 through June 5, 2004 Bahr received PEDA benefits. However, the District decided to pay Bahr as a firefighter, and not his position of shift commander which pays 5% more. The Court held the District had to pay Bahr at the rate he was earning at the time of his injury; meaning, Bahr should have been paid as a shift commander.

Next, Bahr argued he was entitled to a total of two (2) years of PEDA benefits because he suffered two different injuries. Section 1(b) of PEDA states in pertinent part, eligible employees shall continue to be paid “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.” Bahr claimed he was allowed to bank the six months he did not use when he was injured on September 13, 2000. The appellate court agreed with Bahr. The court held it was not the legislative intent to punish firefighters and police officers for returning to work early. As such, because the September 13, 2000 injury was distinct from the June 5, 2003 injury, but did contribute or aggravate the condition leading to Bahr’s disability, he was entitled to an additional six (6) months of PEDA benefits.

Next, the village argued Bahr was not entitled to PSEBA benefits. The court, in light of the Illinois Supreme Court’s ruling in *Krohe* held Bahr was catastrophically injured while responding to an emergency. As such, he was entitled to PSEBA benefits.

Finally, Bahr sought attorneys fees under the Attorney Fees in Wage Actions Act. The court held Bahr was entitled to attorneys fees for his pursuit of PEDA benefits.

### **QDRO – Division of Disability Benefits**

*In re Marriage of Schurtz*, 2008 WL 2265286 (3d Dist. May 28, 2008). Disabled firefighter John Schurtz was divorced in 1993. Pursuant to that agreement he agreed to split his retirement benefits with his ex-wife Lynette. John can continue to collect his disability pension or may elect to collect a traditional retirement pension. The court noted, “Although John’s payments are labeled ‘disability payments,’ they are, essentially retirement benefits.” As such, the court held Lynette was entitled to share in these benefits. This court decided the case based upon a Qualified Domestic Relations Order, which no longer applies to Illinois’ firefighters and police officers. Meaning, the outcome may be different if this case were applied to firefighters or police officers under the current law, namely a Qualified Illinois Domestic Relations Order. It should be noted, Justice Holdridge dissented with the court’s analysis and cited the Associated Fire Fighters of Illinois and the Peoria Firefighters Pension Board’s friend of the court briefs.