

No. 79592

In the
Supreme Court of Illinois

**JAMES McNAMEE, TIMOTHY SCHOOLMASTER, MICHAEL KING,
JOHN GRAHAM, JERRY KOSIK, GLENN ROSE, ROBERT
BURRESS, DAVID NAGEL, DAVID WALL, ROBERT CONWAY,
THE BOARD OF TRUSTEES OF THE STREAMWOOD POLICE
PENSION FUND, THE BOARD OF TRUSTEES OF THE PALOS
HEIGHTS POLICE PENSION FUND, and THE ILLINOIS POLICE
PENSION FUND ASSOCIATION,**

Plaintiffs-Appellees,

vs.

**THE STATE OF ILLINOIS, JIM EDGAR, Governor, STEPHEN
F. SELCKE, Director, ILLINOIS DEPARTMENT OF INSURANCE,**

Defendants-Appellants.

Appeal Under Rule 302(a) from the Circuit Court of Cook County,
Illinois, County Department, Chancery Division, No. 94 CH 884.
The Honorable Albert Green, Judge Presiding.

**BRIEF AND APPENDIX OF
THE PLAINTIFFS-APPELLEES**

RICHARD J. PUCHALSKI, ESQ.
SKLODOWSKI, FRANKLIN, PUCHALSKI
& REIMER
111 West Washington Street, Suite 1000
Chicago, Illinois 60602
(312) 332-4428

Attorneys for the Plaintiffs-Appellees

Oral Argument Requested

LAW OFFICES OF
SKLODOWSKI, FRANKLIN, PUCHALSKI & REIMER

A partnership including professional corporations



Suite 1000
111 W. Washington St.
Chicago, Illinois 60602-2705

(312) 332-4428
(312) 726-4522 (Fax)

Brent M. Christensen
Randy W. Franklin
Michael A. Grochowiak
Hilary L. Gould
Patrick J. Keenan
Gina R. LaMantia
Donald E. Puchalski
Richard J. Puchalski
Richard J. Reimer
Robert L. Sklodowski

Of Counsel
Connie L. Puchalski
Joseph D. Keenan III

April 2, 1996

Mr. James McNamee, President
IPPFA
800 Lee Street, Suite 3
Des Plaines, Illinois 60016-6489

RE: McNamee, et al. vs State of Illinois
No. 79592

Jim:

Enclosed for the Association's file is the Brief we filed in the above case. Please call me, should you have any questions.

Sincerely,



Richard J. Puchalski

RJP:dmb
Enclosure

I.

POINTS AND AUTHORITIES

ARGUMENT

	<u>PAGE NO.</u>
<u>INTRODUCTION</u>	10
40 ILCS 5/3-127	passim
40 ILCS 5/3-125	10
Illinois Constitution art XIII, §5	passim

B.

**THE AMENDMENT OF THE ILLINOIS
 PENSION CODE BY PUBLIC ACT 87-1265
 VIOLATES ARTICLE XIII, SECTION 5
OF THE ILLINOIS CONSTITUTION**

<u>CASES</u>	<u>PAGE NO.</u>
<u>Di Falco vs Firemen's Pension Fund of the Wood Dale Fire Protection District</u> , 122 Ill.2d 22, 521 N.E.2d 923, 925 (1988)	12
<u>Felt vs Board of Trustees of the Judges Retirement System</u> , 107 Ill.2d 158, 481 N.E.2d 698 (1985)	13, 14
<u>Buddell vs Board of Trustees, State University Retirement System</u> , 118 Ill.2d 99, 514 N.E.2d 184 (1987)	14
<u>Kraus vs Niles Police Pension Fund</u> , 72 Ill.App.3d 833, 390 N.E.2d 1281 (1979)	14
<u>Collins vs Board of Trustees</u> , 226 Ill.App.3d 316, 589 N.E.2d 799 (1992)	14
<u>Schroeder vs Morton Grove Police Pension Board</u> , 2129 Ill.App.3d 697, 579 N.E.2d 997 (1991)	14
<u>Greves vs Blue Island Firemen's Pension Fund</u> , 147 Ill.App.3d 956, 498 N.E.2d 618 (1986)	14
<u>Gualano vs City of Des Plaines</u> , 139 Ill.App.3d 456, 487 N.E.2d 1050 (1985)	15

<u>People ex rel. Illinois Federation of Teachers vs Lindberg</u> , 60 Ill.2d 266, 326 N.E.2d 749 (1975)	15
4 Record of Proceedings of the Sixth Illinois Constitutional Convention	13

C.

**THE ARGUMENT OF DEFENDANTS AND
AMICUS THAT ARTICLE XIII, SECTION 5
ONLY PROTECTS PENSION BENEFITS
MISCONSTRUES THAT STATUTORY PROVISION**

	<u>PAGE NO.</u>
<u>Di Falco vs Firemen's Pension Fund of the Wood Dale Fire Protection District</u> , 122 Ill.2d 22, 521 N.E.2d 923, 925 (1988)	16
<u>Kerner vs State Employees' Retirement System</u> , 72 Ill.2d 507, 514, 382 N.E.2d 243 (1978)	16
<u>Felt vs Board of Trustees of the Judges Retirement System</u> , 107 Ill.2d 158, 481 N.E.2d 698 (1985)	16
<u>Peters vs City of Springfield</u> , 57 Ill.2d 142, 311 N.E.2d 107 (1974)	17

D.

**THE AMENDMENT TO SECTION 3-127
OF THE ILLINOIS PENSION CODE
SUBSTANTIALLY IMPAIRS AND DIMINISHES
THE PENSION RIGHTS OF THE PLAINTIFFS**

	<u>PAGE NO.</u>
<u>Schultz vs American National Bank</u> , 40 Ill.App.3d 800, 352 N.E.2d 310 (1976)	19
<u>Hill vs Chicago Housing Authority</u> , 233 Ill.App.3d 923, 599 N.E.2d 1118 (1992)	19
<u>Board of Trustees of the Rockford Police Pension Fund vs City of Rockford</u> , 96 Ill.App.3d 102, 420 N.E.2d 1126 (2nd Dist. 1981)	21

E.

THE TRIAL COURT PROPERLY FOLLOWED
ON THE HOLDING IN McDERMOTT VS REGAN

	<u>PAGE NO.</u>
<u>Buddell vs Board of Trustees, State University Retirement System</u> , 118 Ill.2d 99, 106-07, 514 N.E.2d 184 (1987)	22
<u>Felt vs Board of Trustees of the Judges Retirement System</u> , 107 Ill.2d 158, 481 N.E.2d 698 (1985)	22
<u>Kraus vs Board of Trustees of the Niles Police Pension Fund</u> , 72 Ill.App.3d 833, 390 N.E.2d 1281 (1st Dist. 1979)	22
<u>McDermott vs Regan</u> , 191 A.D.2d 47, 599 N.Y.S.2d 718 (1993)	22, 23, 24
<u>Sqaglione vs Levitt</u> , 375 N.Y.S.2d 79, 337 N.E. 592 (1975) . .	23

F.

THE COURT CANNOT CONSIDER
THE NEW AND ADDITIONAL
ARGUMENTS OF AMICUS CURIAE

	<u>PAGE NO.</u>
<u>Moran vs Gust K. Newberg/Dugan & Meyers</u> , 268 Ill.App.3d 999, 645 N.E.2d 489 (1st Dist. 1994)	24
<u>Forster vs Plant</u> , 252 Ill.App.3d 692, 625 N.E.2d 198 (1st Dist. 1993)	24
<u>Lannom vs Kosco</u> , 158 Ill.2d 535, 634 N.E.2d 1097 (1994)	24
<u>Zurich Insurance Co. vs Raymark Industries</u> , 118 Ill.2d 24, 514 N.E.2d 150, 166 (1987)	24
<u>Fiorito vs Jones</u> , 72 Ill.2d 73, 377 N.E.2d 1019 (1978)	24
<u>People vs P.H.</u> , 145 Ill.2d 209, 582 N.E.2d 400, 711 (1991)	24

Archer Daniels Midland Company vs Industrial
Commission, 138 Ill.2d 107, 561 N.E.2d 623,
627 (1990) 24

I.

STATEMENT OF THE CASE

The plaintiffs in this case consist of individuals who are participants and beneficiaries in various police pension funds throughout the State of Illinois. Additional plaintiffs include the Board of Trustees of the Streamwood Police Pension Fund and the Board of Trustees of the Palos Heights Police Pension Fund. The IPPFA, an organization representing over one hundred ninety Illinois police and firefighter pension funds is also a plaintiff. At the trial court level, no objections were made as to the standing of any of the plaintiffs.

This action was brought against the State of Illinois, its Governor, Jim Edgar and the Illinois Department of Insurance seeking declaratory and injunctive relief concerning a recent amendment to the Illinois Pension Code. Specifically, the plaintiffs contend that the January 25, 1993 amendment to the Illinois Pension Code, Public Act 87-1265 is unconstitutional because it violates article XIII, section 5 of the Illinois constitution.

The trial court agreed with the plaintiffs' position and on August 4, 1995 summary judgment was granted in favor of the plaintiffs and against the defendants. The Circuit Court of Cook County issued a declaratory judgment finding that Section 3-127 of the Illinois Pension Code as amended by Public Act 87-1256 was unconstitutional as violative of Article XIII, Section 5 of the Illinois Constitution.

The defendants filed a notice of appeal to this Court pursuant

to Supreme Court Rule 302(a). The Illinois Municipal League has filed an amicus curiae brief in support of the defendants-appellants.

II.

ISSUE PRESENTED FOR REVIEW

The issue before this Court is whether the amendment to Section 3-127 of the Illinois Pension Code, 40 ILCS 5/3-127, violates article XIII, section 5 of the Illinois Constitution.

III.

CONSTITUTIONAL PROVISIONS

This case turns on the legal interpretation of article XIII, section 5 of the Illinois Constitution which provides:

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).

IV.

STATEMENT OF UNCONTESTED FACTS

Although the defendants did not file a cross-motion for summary judgment at the trial court level, they did not dispute the facts that the plaintiffs presented in support of their motion for summary judgment. Nor did the defendants present any counter-affidavits.

Prior to January 1, 1993, Section 3-127 of the Illinois Pension Code provided as follows:

3-127. Reserves

§3-127. Reserves. The board shall establish and maintain a reserve to insure the payment of all obligations incurred under this Article. The reserve to be accumulated shall be equal to the estimated total actuarial requirements of the fund.

If a pension fund has a reserve of less than the accrued liabilities of the fund, the board of the pension fund, in making its annual report to the city council or board of trustees of the municipality, shall designate the amount needed annually to insure the accumulation of the reserve to the level of the fund's accrued liabilities over a period of 40 years subsequent to January 1, 1980, for pension funds then in operation, or subsequent to the date of establishment in the case of a fund created thereafter, so that the necessary reserves will be attained over such a period.

(emphasis supplied).

In January of 1993, the Illinois legislature amended the above provision (S.B. 1650, enacted as Public Act 87-1265). As a result of that amendment, Section 3-127 read as follows:

5/3-127. Reserves

§3-127. Reserves. The board shall establish and maintain a reserve to insure the payment of all obligations incurred under this Article. The reserve to be accumulated shall be equal to the estimated total actuarial requirements of the fund.

If a pension fund has a reserve of less than the accrued liabilities of the fund, the board of the pension fund, in making its annual report to the city council or board of trustees of the municipality, shall designate the amount, calculated as a level percentage of payroll, needed annually to insure the accumulation of the reserve to the level of the fund's accrued liabilities over a period of 40 years from July 1, 1993 for pension funds then in operation, or from the date of establishment in the case of a fund created thereafter, so that the necessary reserves will be attained over such a period.
(emphasis supplied)

(40 ILCS 5/3-127)

By virtue of the above amendment, the change in the law was two-fold. First the above amendment changed the forty year period within which police pension funds are to meet the Code's funding requirements. Municipalities are given an additional 13 ½ years to become fully funded. Second, the new law changed the method of computing the annual contributions to police pension funds from an annual normal cost basis to a level percentage of payroll basis.

At the trial court the defendants admitted that these two changes were made. The defendants also admitted that the above amendment gives municipalities 13½ more years to fully fund their police pension funds and that the funding method was changed to a level percentage of payroll basis. (C 113).

Prior to moving for summary judgment the plaintiffs deposed two employees of the Illinois Department of Insurance, the state

agency that regulates police pension funds. Thomas Jones is the Assistant Deputy Director of the Department of Insurance and he is in charge of the Public Pension Fund Division. (C 77). Mr. Jones testified that as a result of the January 1993 amendment to 40 ILCS 5/3-127, the forty year period to fully fund police pension funds was pushed back $13\frac{1}{2}$ years. (C 80). This amendment has further allowed municipalities to make smaller contributions to police pension funds than they had to make prior to the amendment. (C 81). This change in the law according to Jones, currently produces less assets for police pension funds, which means less money for investment purposes and less assets to cover current liabilities. (C 83, 84).

Larry Gorski is employed as an actuary with the Illinois Department of Insurance. (C 91). He also agrees that as a result of the amendment to §3-127 the amount of money that municipalities will have to currently contribute to police pension funds will be less, which will mean less assets for the funds. (C 92). The more assets a pension fund has, the more secure that fund is. (C 93). Mr. Gorski also admitted that if a municipality follows the funding calculations of the Department of Insurance under the amended §3-127, all other things being equal, a police pension fund is less secure than it would have been prior to the amendment. (C 93, 94).

In support of its motion for summary judgment, the plaintiffs submitted the affidavit of an expert witness, Arthur H. Tepfer a professional actuary who is a member of the American Academy of Actuaries and an Associate of the Society of Actuaries. Mr.

Tepfer's affidavit¹ was never contradicted by the defendants.

Mr. Tepfer made the following statements and opinions in his affidavit.

(5) The amendment to 40 ILCS 5/3-127 of the Illinois Pension Code defers municipal contributions to police pension funds in the State of Illinois for later and later periods by using negative amortization of unfunded liabilities.

(6) In the early years of this new funding method, police pension funds will be detrimentally affected because municipal contributions will be insufficient to pay the interest on the funds' unfunded liability, let alone reduce the outstanding principal. This "non-funding" will cause these pension fund liabilities to increase dramatically.

(7) The new funding method under 5/3-127 does not build up reserves as fast as the previous statutory provision did and thus produces less assets for the pension fund. As a result the amended provision provides a funding mechanism that is less secure than the former funding method.

(8) Over the long term, total contributions to police pension funds would have been larger under the prior language of 5/3-127.

(9) The amended 5/3-127 has lengthened the period over which the unfunded accrued liability is to be amortized, but more importantly, changes the method of computation of the annual contributions made to each police pension fund.

(10) The amended 5/3-127 permits the amortization of contributions as a level percentage of payroll, rather than as a level dollar payment which results in an initial substantial increase in the unfunded liabilities of police pension funds.

¹ A copy of the Tepfer affidavit is set out in the Appendix to this brief.

(11) As a result of the above, the amendment to 5/3-127 substantially impairs and diminishes the pension benefits to participants and beneficiaries of Illinois police pension funds.

(Tepfer Aff. ¶s (5)-(11), C, 59).

The plaintiffs also submitted to the trial court an article authored by Tepfer concerning the finding implications of the amendment to §3-127. (C 64-72).²

The trial court, in granting the plaintiff's motion for summary judgment found that the intention of article XIII, section 5 is two-fold. First, according to the circuit court, the constitutional provision creates a contractual relationship between the employer and the employee. Second, the constitutional provision mandates the Illinois General Assembly not to diminish or impair those rights. (Tr. pg. 10). Relying on the New York case of McDermott vs Regan, 599 NYS2d 718 (1993), the trial court determined that the amendment to §3-127 radically changes the method of computing the rate of pension contributions and substantially impairs and diminishes the pension rights of the plaintiffs. (Tr. pg. 13).

As is shown in the pages that follow, the analysis and decision of the trial court is correct and should be affirmed.

² This article is also set out in the Appendix and demonstrates the adverse effects that P.A. 87-1265 will have on Illinois police pension funds.

V. ARGUMENT

A.

INTRODUCTION

In order to completely understand the issues here, it is necessary to have an understanding as to how police pensions funds are funded. It is obvious that funding of Illinois police pension systems is required under Illinois law to preserve benefit security for the participants and beneficiaries of the pension funds and to ensure that the cost of the pension program is adequately budgeted and paid for by the current generation of municipal taxpayers.

To understand the statutory funding requirements under Article 3, §3-127 must be read in conjunction with §3-125.³

The funding of Article 3 police pensions consists of two components:

³ Section 3-125 of the Pension Code provides in pertinent part:

§3-125. Financing. The city council or the board of trustees of the municipality shall annually levy a tax upon all the taxable property of the municipality at the rate on the dollar which will produce an amount which, when added to the deductions from the salaries or wages of police officers, and revenues available from other sources, will equal a sum sufficient to meet the annual requirements of the police pension fund. The annual requirements to be provided by such tax levy are equal to (1) the normal cost of the pension fund for the year involved, plus (2) the amount necessary to amortize the fund's unfunded accrued liabilities as provided in Section 3-127. The tax shall be levied and collected in the same manner as the general taxes of the municipality, and in addition to all other taxes now or hereafter authorized to be levied upon all property within the municipality, and shall be in addition to the amount authorized to be levied for general purposes as provided by Section 8-3-1 of the Illinois Municipal Code, approved May 29, 1961, as amended.

(40 ILCS 5/3-125)

- (1) the annual normal cost of the pension fund for the year involved, and
- (2) the amount necessary to amortize the fund's unfunded accrued liabilities.

Pension benefits that are earned each year are funded through the payment of a normal annual cost. Changes in the pension fund due to unforeseen gains and losses or prior miscalculations are segregated into an accrued liability. An unfunded accrued liability is established annually for each pension fund by subtracting current assets of the pension fund from the accrued liability.

Prior to January 1, 1993, Section 3-127 provided in pertinent part:

If a pension fund has a reserve of less than the accrued liabilities of the fund, the board of the pension fund, in making its annual report to the city council or board of trustees of the municipality, shall designate the amount needed annually to insure the accumulation of the reserve to the level of the fund's accrued liabilities over a period of 40 years subsequent to January 1, 1980, for pension funds then in operation, or subsequent to the date of establishment in the case of a fund created thereafter, so that the necessary reserves will be attained over such a period.

A reading of this prior legislation indicates that this unfunded accrued liability is to be treated much like a mortgage and paid off in equal amounts over a forty year period ending January 1, 2020.

As the defendants readily admit on page 13 of their brief, Public Act 87-1265 lengthened the period of time in which the unfunded accrued liability is to be paid off. The amendment also permits the unfunded accrued liability to be paid off as a level

percentage of payroll rather than in equal payments. Thus, not only is the time extended within which police pensions must be fully funded the method of computation of the annual payment has also changed, allowing smaller contributions currently.

These smaller contributions mean less current investment income for police pension funds.

B.

**THE AMENDMENT OF THE ILLINOIS
PENSION CODE BY PUBLIC ACT 87-1265
VIOLATES ARTICLE XIII, SECTION 5
OF THE ILLINOIS CONSTITUTION**

Article XIII, section 5 of the Illinois Constitution provides a constitutional protection as to the individual plaintiff's pensions. Prior to January 1, 1993 the individual plaintiffs had a statutory enforceable right to have their pensions fully funded by the year 2020 and to have their pensions funded at a certain annual minimal level.

The above protection emanates from article XIII, section 5 of the 1970 constitution which provides:

"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."

This provision became effective July 1, 1971. After that date, the "contractual relationship" is governed by the actual terms of the Illinois Pension code at the time the employee becomes a member of the pension system. Di Falco vs Firemen's Pension Fund of the Wood Dale Fire Protection District, 122 Ill.2d 22, 521 N.E.2d 923, 925 (1988).

This Court has held that the intention of section 5 is two-fold. First, the constitutional provision creates a contractual relationship between the employer and the employee; secondly, Section 5 mandates the General Assembly not to impair or diminish those rights. Felt vs Board of Trustees of the Judges Retirement System, 107 Ill.2d 158, 481 N.E.2d 698 (1985).

Delegate Helen C. Kinney, who with Delegate Henry I. Green was the sponsor of the provision that became section 5 of article XIII, further explained that the intention of section 5 was:

"...simply to give [public employees] a basic protection against abolishing their rights completely or changing the terms of their rights after they have embarked upon the employment - to lessen them." (4 Record of Proceedings, Sixth Illinois Constitutional Convention 2929).

Delegate Kinney went on to state:

"all we are seeking to do is to guarantee that people will have rights that were in force at the time they entered into the agreement to become an employee..." (4 Record of Proceedings, Sixth Illinois Constitutional Convention 2930).

Delegate Whalen noted:

"all [the pension provision] does is say that the pension is a contractual interest which the pensioner has; and the line of cases again has repeatedly held that this is a contractual right and may be subject to any contingency built into the contract." (4 Record of Proceedings Sixth Illinois Constitutional

Convention 2930).

Thus, it should be clear from the above comments that article XIII, section 5 was intended to protect all aspects of Illinois public employees' pension rights.

Applying the constitutional protections of article XIII, section 5, Illinois higher courts have invalidated amendments to the Illinois Pension Code in the following situations. A Pension Code amendment changing the salary base of judges' retirement pensions was declared unconstitutional in Felt vs Board of Trustees of the Judges Retirement System, 107 Ill.2d 158, 481 N.E.2d 698 (1985). An amendment to the Pension Code eliminating a participant's right to purchase military service credits was found to violate article 13, section 5 in Buddell vs Board of Trustees, State University Retirement System, 118 Ill.2d 99, 514 N.E.2d 184 (1987). A statutory amount changing the amounts paid to a beneficiary who switches from disability retirement to regular retirement was found to violate the Illinois constitution. Kraus vs Niles Police Pension Fund, 72 Ill.App.3d 833, 390 N.E.2d 1281 (1979). A statutory amendment requiring transferred paramedics to pay additional amounts to obtain service credits was found in violation of the Illinois constitution in Collins vs Board of Trustees, 226 Ill.App.3d 316, 589 N.E.2d 799 (1992). An amended Pension Code provision requiring the reduction of pension benefits based upon the receipt of workers compensation benefits has been found to be in violation of article 13, section 5 in a number of cases. Schroeder vs Morton Grove Police Pension Board, 2129 Ill.App.3d 697, 579 N.E.2d 997 (1991); Greves vs Blue Island Firemen's Pension Fund, 147 Ill.App.3d 956, 498 N.E.2d 618 (1986);

Gualano vs City of Des Plaines, 139 Ill.App.3d 456, 487 N.E.2d 1050 (1985). The situation in this case is analogous to the situation in the cases cited above. The amendment to §3-127 of the Illinois Pension Code by P.A. 87-1265 has diminished and impaired the pension rights of participants and beneficiaries in Illinois police pension funds.

The defendants argue under People ex rel. Illinois Federation of Teachers vs Lindberg, 60 Ill.2d 266, 326 N.E.2d 749 (1975) that article XIII, section 5 does not constitutionally require a specific level of pension funding. The plaintiffs do not dispute that holding. However, once a specific level of funding is established by statute the pension fund participants have a constitutional right not to have that funding method abolished or changed.

Section 3-127 of the Pension Code, (not the Illinois Constitution), prior to the passage of P.A. 87-1265 specifically mandated an annual level of funding and a deadline by which police pension funds had to be completely funded. The passage of P.A. 87-1265 changed that and diminished the plaintiffs' pension funding rights. Here, the legislature, by statute created a contractual right to a specific right to a specific funding level and funding timetable. As the defendants demonstrate in the Appendix of their brief, the legislature established the forty year funding requirement in 1980, after the effective date of the Illinois Constitution and after the effective date of this Court's decision in People ex rel. Illinois Federation of Teachers vs Lindberg, 60 Ill.2d 266, 326 N.E.2d 749 (1975). The amendments to Section 3-127 in 1980, 1984, and 1985 would indicate a legislative intention to

establish a contractual right of police pension participants to be fully funded in the pension by the year 2020 and a right to a minimum annual contribution.

C.

**THE ARGUMENT OF DEFENDANTS AND
AMICUS THAT ARTICLE XIII, SECTION 5
ONLY PROTECTS PENSION BENEFITS
MISCONSTRUES THAT STATUTORY PROVISION**

In order to circumvent the protections of article XIII, section 5, the defendants and amicus argue that pension benefits are constitutionally protected. This argument misconstrues the constitutional provision at issue.

The meaning of the provision is clear: "membership in the pension system...shall be an enforceable contractual relationship the benefits of which shall not be diminished or impaired." What is protected under the above language is the benefits of the contractual relationship, not pension benefits in the generic sense. This Court has held that the "contractual relationship" under article XIII, section 5 is governed by the actual terms of the Pension Code itself. See, Di Falco vs Board of Trustees, Firemen's Pension Fund of the Wood Dale Fire Protection District, 122 Ill.2d 22, 521 N.E.2d 923, 925 (1988); Kerner vs State Employees' Retirement System, 72 Ill.2d 507, 514, 382 N.E.2d 243 (1978). This Court has held that there is a specific reference in the Illinois Constitution to pension rights. Felt vs Board of Trustees of the Judges Retirement System, 107 Ill.2d 158, 48 N.E.2d 698 (1985). The contractual entitlement to a particular funding level and method is a pension right that the plaintiffs had a vested protection.

The case of Peters vs City of Springfield, 57 Ill.2d 142, 311 N.E.2d 107 (1974), relied on by both the defendants and amicus, is readily distinguishable. In Peters the issue was whether article XIII, section 5 precluded a municipality from reducing the mandatory retirement age of its police officers and firefighters. This Court held that the Constitution did not. (311 N.E.2d at 112). In Peters, the right at issue (mandatory retirement age), was not a right contained in the Pension Code, but rather the Municipal Code.

The pension protections accorded by the Illinois Constitution covers more than just pension benefits. This protection extends to all contractual rights that participants and beneficiaries receive under the Pension Code. In this case it is the right to be fully funded by a particular date in time and the right to a minimum level of annual funding.

D.

**THE AMENDMENT TO SECTION 3-127
OF THE ILLINOIS PENSION CODE
SUBSTANTIALLY IMPAIRS AND DIMINISHES
THE PENSION RIGHTS OF THE PLAINTIFFS**

The defendants and amicus also argue that Public Act 87-1265 does not diminish or impair the pension rights of the plaintiffs. This assertion is contradicted by the evidence set out in the record. The uncontradicted evidence proffered by the plaintiffs' expert as well as the admissions of the defendants' own agents indicate that plaintiffs' pension rights have been diminished and impaired in a number of ways.

As is explained below, the plaintiffs' pension rights are diminished and impaired because their pensions will not become

fully funded in the year 2020, as the statute previously guaranteed. The plaintiffs pension rights are also diminished and impaired because under the amendment municipalities are allowed to make smaller annual contributions currently, which means less investment income and less security.

The plaintiffs retained an expert witness in this case. Arthur H. Tepfer is an actuary with twenty five years experience in the actuarial profession. He is a member of the American Academy of Actuaries, an Associate of the Society of Actuaries and an Enrolled Actuary. (C 59). Mr. Tepfer is familiar with the amendment to Section 3-127 of the Pension Code. His affidavit indicates that the new funding method created by the amendment defers municipal contributions to police pension funds to later and later periods by using negative amortization of unfunded liabilities. (C 59). In the early years of this new funding method, police pension funds are detrimentally affected because municipal contributions are insufficient to even pay the interest on the unfunded liability, let alone reduce the outstanding principal. This "non-funding" causes these liabilities to increase dramatically. (C 60). The new funding method under §3-127 does not build up pension fund reserves in the same manner as under the former §3-127 and in fact produces less assets. Therefore, by definition, the new method of funding under §3-127 is less secure than the former funding method. (C 60).

According to Mr. Tepfer, the amendment to §3-127 substantially impairs and diminishes the pension benefits to participants and beneficiaries of Article 3 police pension funds. (C 60). The obvious flaw in the new legislation is that unfunded liabilities

may never become fully paid off. Since police pension funds are receiving less assets because of a lower contribution level, investment income will be lower. Over the long term, total contributions would have been larger under the prior language of §3-127. (C 60).

Mr. Tepfer also authored an article on the adverse funding implications of P.A. 87-1265 (C 60). That article was made a part of the record without objection. (C 64-72). The statements contained in these materials must be taken as true when not denied or controverted by a counteraffidavit. Schultz vs American National Bank, 40 Ill.App.3d 800, 352 N.E.2d 310 (1976); Hill vs Chicago Housing Authority, 233 Ill.App.3d 923, 599 N.E.2d 1118 (1992).

The plaintiffs also deposed agents of the Illinois Department of Insurance. These witnesses also indicated that as a result of P.A. 87-1265, the forty year period to fully fund police pension funds was pushed back 13½ years and the amendment has further allowed municipalities to make smaller contributions to police pension funds than they had to make prior to the amendment. This change in the law currently produces less assets for police pension funds, which means less money for investment purposes and less assets to cover current liabilities. (C 74-87, C 89-96).

After the 1993 amendment the Public Pension Fund Division of the Illinois Department of Insurance published a report to Governor Edgar which in part deals with the amendment to 5/3-127. (C 85). Excerpts of that report were also submitted to the trial court. (C 99-103). The defendant's own report discusses the negative impact of this statutory amendment:

The Changes

In this context, Public Act 87-1265 made two changes in each Article that for a few years will alleviate such pressure:

1. The beginning of the 40-year amortization period was moved from January 1, 1980 to July 1, 1993.
2. The minimum annual amount required to amortize the unfunded accrued liability over the number of years remaining in the 40-year period will be calculated "as a level percentage of payroll."

The first change gives municipalities 13 ½ more years in which to meet the pension funding requirements. It will have the effect of lowering annual contributions from the municipalities to the pension funds much like a new mortgage enables the homeowner to make lower monthly payments.

The second change has a greater impact. Because payrolls do not increase as rapidly as accrued liabilities, this change enables municipalities to make smaller contributions than they would have under the "equal annual payment" approach that had been the predominant practice. However, accrued liabilities will continue to grow in the same manner - independently of any statutory formula.

(1993 Public Pension Report; C 102-103)

The above evidence clearly establishes impairment and diminishment of police pension rights.

The defendants argue that §3-127 does not require a particular level of funding. That is simply incorrect. According to the evidence and a joint reading of §3-127 and §3-125 the amendment clearly allows municipalities to contribute less amounts to police pension funds currently, thus lowering the minimum contribution amounts.

Defendants argue that there has been no impairment because the plaintiffs do not allege that pension benefits have not been paid or are in danger of not being paid. This contention clouds the real issue. The contractual pension rights are presently being violated. The right to have a fully funded pension by the year 2020 has been extinguished. Pension contributions are allowed to be smaller which less investment earnings and less pension fund security, according to defendants' own agents. (C 74-87).

In practical terms, what the amendment to §3-127 accomplished, was to allow municipalities to "re-finance" their police pension obligations. These municipalities have 13½ more years to pay off their pension obligations and they can currently pay their contributions in smaller amounts.

Defendants also rely on Board of Trustees of the Rockford Police Pension Fund vs City of Rockford, 96 Ill.App.3d 102, 420 N.E.2d 1126 (2nd Dist. 1981) to support their proposition that Public Act 87-1265 does not jeopardize pension rights. That case is readily distinguishable. City of Rockford, dealt with the propriety of a mandamus action to compel the municipality to make pension contributions in accordance with the Department of Insurance actuarial determinations. The Second District Appellate Court held that a municipality does have some discretion in determining the dollar amount to be levied for pension funds. That case did not state that the municipality could ignore the funding requirements of §3-125 and §3-127. Nor did the case address the issue here, which is the application of article XIII, section 5 on Pension Code amendments.

E.

**THE TRIAL COURT PROPERLY FOLLOWED
ON THE HOLDING IN McDERMOTT VS REGAN**

A number of the decisions from this Court, as well as the various appellate courts indicate that section 5 of article XIII was adopted from the language of the New York constitutional provision, which contains almost identical language. See e.g., Buddell vs Board of Trustees, State University Retirement System, 118 Ill.2d 99, 106-07, 514 N.E.2d 184 (1987); Felt vs Board of Trustees of the Judges Retirement System, 107 Ill.2d 158, 481 N.E.2d 698 (1985); Kraus vs Board of Trustees of the Niles Police Pension Fund, 72 Ill.App.3d 833, 390 N.E.2d 1281 (1st Dist. 1979). The reason for this judicial reliance is that as previously indicated, the language of the New York constitution is virtually identical to that of article 13, section 5 of the Illinois constitution and as a result, the Illinois courts often rely on New York case law when deciding issues under this constitutional provision. The recent Court of Appeals (New York's highest court) case of McDermott vs Regan, 191 A.D.2d 47, 599 N.Y.S.2d 718 (1993) is virtually identical to the facts here. In that case the New York pension law was amended changing the funding method of public employee pensions. The result of these legislative changes was a reduction in employer contributions, (identical to the situation here). The lower court held that the legislation was unconstitutional. The New York Court of Appeals affirmed.

The Court of Appeals reasoned that close examination is...required of any radical change in means chosen to maintain the integrity and security of the sources from which protected benefits

are to be paid. (citing Sgaglione vs Levitt, 375 N.Y.S.2d 79). The McDermott court stated:

Surely, if as Sgaglione v. Levitt (supra) teaches, the Legislature cannot require the Comptroller—who has a fiduciary duty to act as an independent trustee of retirement systems' funds—to invest in legislatively selected bonds, it cannot compel the Comptroller to carry out the dramatic funding changes which chapter 210 works. Moreover, chapter 210 does not simply impose a funding method on the Comptroller; it also dictates the rapid depletion of the surplus funds that currently exist, a further usurpation of the Comptroller's authority to manage the accounts of the fund. (599 N.Y.S.2d at 721)

The amendment by P.A. 87-1265 does precisely the same thing prohibited by the Court of Appeals in McDermott - it radically changes the method of computing the rate of pension contributions and creates a constitutional impairment of the rights of police pension fund participants and beneficiaries.

Just as in the case here, the New York legislature amended the pension statute changing the funding method. Just as in this case, the New York court of Appeals found that the funding change impaired the pension rights of the pension fund participants. The effect of the funding changes in McDermott is identical to the funding change here. In both cases, the amendments shift the burden of pension fund from the present, to the future. McDermott, supra, 599 NYS2d at 720.

Defendants argue that McDermott is somehow not applicable because New York courts have made no attempt to interpret the Illinois Constitution. What the defendants fail to address is the obvious fact that the Illinois courts have often looked to and addressed the very similar New York Constitution and the cases

construing the New York provision. Contrary to the defendants' arguments, Illinois precedent has long relied on New York case law.

As stated in McDermott, members of a state retirement system:

"[a]re entitled to more than simply a guarantee of benefits; they are entitled to some degree of protection of the sources of the funds from which the benefits will ultimately be drawn." 599 N.Y.S.2d at 721.

F.

**THE COURT CANNOT CONSIDER
THE NEW AND ADDITIONAL
ARGUMENTS OF AMICUS CURIAE**

A party may not raise an issue on appeal which was not raised in the trial court. Moran vs Gust K. Newberg/Dugan & Meyers, 268 Ill.App.3d 999, 645 N.E.2d 489 (1st Dist. 1994); Forster vs Plant, 252 Ill.App.3d 692, 625 N.E.2d 198 (1st Dist. 1993). The parties did not argue and the trial court did not consider the effects of finding §3-127 as amended by P.A. 87-1265 unconstitutional. It is too late for amicus to make that argument now. See, Lannom vs Kosco, 158 Ill.2d 535, 634 N.E.2d 1097 (1994).

By definition, an amicus curiae is not a party to the action but a friend of the court. Zurich Insurance Co. vs Raymark Industries, 118 Ill.2d 23, 514 N.E.2d 150, 166 (1987). As such, the sole function of an amicus is to advise or make suggestions to the court. Fiorito vs Jones, 72 Ill.2d 73, 96, 377 N.E.2d 1019 (1978). An amicus takes the case as he finds it, with the issues framed by the parties. People vs P.H., 145 Ill.2d 209, 582 N.E.2d 400, 711 (1991). Arguments made by an amicus but not espoused by the parties have no binding effect on the parties and should not be considered by the reviewing court. Archer Daniels Midland Company vs Industrial Commission, 138 Ill.2d 107, 561 N.E.2d 623, 627

(1990). Thus, the Court should not consider the final argument that amicus curiae makes in its brief.

VI.

CONCLUSION

For the reasons stated above the Circuit Court of Cook County was correct in declaring that the amendment to §3-127 of the Illinois Pension Code by P.A. 87-1256 diminished and impaired the contractual rights of the plaintiffs and was thus in violation of article XIII, section 5 of the Illinois Constitution.

Respectfully Submitted,

SKLODOWSKI, FRANKLIN, PUCHALSKI & REIMER

By:


Attorneys for Plaintiffs-Appellees

RICHARD J. PUCHALSKI, ESQ.
SKLODOWSKI, FRANKLIN, PUCHALSKI & REIMER
111 West Washington, Suite 1000
Chicago, Illinois 60602
(312) 332-4428
Firm Id. No. 89500