DOI Flip-Flops on Tier 2 Firefighters' Reciprocity

On December 22, 2015, Deputy Director Mary Jane Adkins issued a DOI Opinion opining tier 2 firefighters who exercise reciprocity would be considered tier 1 because the reciprocity section of the Pension Code does not provide for a tier 2 benefit. However, apparently after some prodding, the DOI changed its mind.

On February 11, 2016, Deputy Director Adkins wrote "a follow up to our advisor opinion issued on December 22, 2015." The DOI clarified, "the letter issued on December 22, 2015, does not accurately reflect the Division's interpretation of the law and opinion in this matter; **the letter is now withdrawn and superseded by this advisory opinion**." That is the legalese way of writing, "and this time, we mean it…"

In its second opinion on the subject, DOI concludes tier 2 firefighters, even if they exercise reciprocity, will remain tier 2 firefighters regardless of they engaged in reciprocity. DOI reaches this position despite there being no tier 2 provision in the reciprocity section of Article 4. DOI explains its latest theory for this change of heart in its, February 11, 2016, opinion.

This time, the DOI explains, firefighters (who are hired after January 1, 2011) who exercise reciprocity are not tier 1 firefighters because the General Assembly used the term "notwithstanding any provision of this Article" at the beginning of the Section describing regular retirement benefits. The DOI asserts after a "plain reading" of the statute, "it clear that 4-109.3 would only provide the appropriate benefit for a firefighter as provided for by their 'tier' status and would not provide 'tier 1' type benefits to those firefighters who would otherwise receive 'tier 2' benefits." The DOI also concludes the retirement portion of the Pension Code "unambiguously" changes the separate and distinct reciprocity section of the Pension Code. On March 15, 2016, the DOI stuck to its, February 11, 2016, interpretation of the impact of reciprocity on firefighters' tier 2 status.

All three opinions were issued by the Deputy Director of the Public Pension Division of DOI, Mary Jane Adkins. Apparently, the DOI's "plain reading" of an "unambiguous" statutory provision proved less "clear" during the 2015 holiday season when it issued a formal opinion expressing an opinion that is diametrically opposite of its current position. Even with a "plain

reading" of the "unambiguously" "clear" language of the DOI's opinions, some readers are left wondering why did the DOI change its position? The manner by which this change of position came about is a matter of public record and will be explored further. ❖

Longevity Buyout Not Part of Pensionable Salary

Village of Chicago Ridge v. Chicago Ridge Firefighters' Pension Bd. Of Trustees, 2016 IL App (1st) 152089

In a recent holding, the First District Appellate Court found that, when not included as part of a municipal appropriations ordinance, a longevity bonus granted by the terms of a CBA should not be included as part of pensionable salary.

The case arose out of the retirement application of Chicago Ridge firefighter David Bricker. Pursuant to the terms of the CBA, Bricker was entitled to a 20% increase in his salary on his last day worked if he retired on his 25th anniversary and was 50 years old or over. The Pension Board included this bonus as longevity pay based in part on a DOI advisory opinion. As a result, the Pension Board found Bricker's salary for pension purposes was $110,277.61 as opposed to $95,155.78.

The Village took administrative review of the Pension Board's decision arguing the 20% longevity bonus should not have been included as part of Bricker's salary. In analyzing this claim, the Appellate Court noted Section 4-118.1 of the Pension Code defines salary as "the annual salary, including longevity, as established by the municipality appropriation ordinance". Section 4402.30 of the Administrative Code also makes reference to the municipal appropriations ordinance in defining salary for pension purposes. Based on the statutory language, the Appellate Court found the calculation of salary used to determine pensionable salary must be approved or established through an appropriation ordinance of the municipality. In this case, that did not happen with respect to Bricker's 20% longevity increase.

The Pension Board agreed the 20% buyout was not approved through a municipal appropriations ordinance however, it argued the CBA which included the 20% buyout was approved by resolution of the village board thereby making the 20% increase pensionable. The Court found that Village approval of the CBA was insufficient to constitute salary as approved through an appropriations ordinance. Specifically, the Court found, "An appropriation involves the setting apart from public revenue a certain sum of money for a specific object. Where an act is required to be done by appropriations ordinance, anything less, such as a resolution or referendum, is not sufficient."

Because the Court found the specific language of the Pension Code and Administrative Code to be clear and unambiguous in defining pensionable salary as that which is approved through an appropriations ordinance, the Court reversed the decision of the Pension Board and remanded the case to make a determination of pensionable salary without the 20% buyout. ❖

DOI Issues Advisory Opinion on Corporate Bond Downgrades

Article 3 and 4 Pension Funds are allowed to invest in corporate bonds managed through an investment advisor if all of the following requirements are met:

> "(1) The bonds must be rated as investment grade by one of the 2 largest rating services at the time of purchase.
>
> (2) If subsequently downgraded below investment grade, the bonds must be liquidated from the portfolio within 90 days after being downgraded by the manager."
>
> 40 ILCS 5/1-113.2(14)

Recently, we have seen more than one fund face a situation where one of its corporate bonds is downgraded below investment grade by Moody's but not S&P. RDK asked the DOI to weigh in on the effect of a downgrade by only one of the two largest rating agencies. In response, the DOI has advised its interpretation of the above statute requires the Fund to liquidate the downgraded bond.

Specifically, the DOI opined the fund must liquidate the downgraded bond "even if another rating agency has not (yet) downgraded the bond."
The DOI went on to state, "When read in its entirety, it is clear Section 1-113.2(14) intends that an article 3 or 4 (sic) is not permitted to hold a corporate bond rated below investment grade."

Finally, the DOI opined that investment managers/advisors serve in a fiduciary capacity to the fund and must therefore liquate the downgraded bonds immediately even while acknowledging the Statue allows 90 days to liquidate thereby "avoiding a fire sale" in the words of the opinion. "To do otherwise would be contrary to their fiduciary responsibilities of care, skill, prudence and diligence under the circumstances then prevailing that a prudent man would use."

While a formal written opinion was requested, due to time constraints the above opinion was issued via email correspondence. A request has been made to memorialize the DOI opinion in a formal opinion and we will continue to provide any updates as they become available.

Supreme Court Throws Out Chicago Pension Reform

Jones v. Municipal Employees' Annuity & Benefit Fund of Chicago, 2016 IL 119618

The Illinois Supreme Court has thrown out the legislatively enacted pension reformed aimed at two Chicago pension funds. The matter before the Court was whether Public Act 98-641 (Act), designed to address Chicago's pension issues with respect to Chicago's Municipal Employees' Annuity and Benefit Fund (MEABF) and Laborers' Annuity and Benefit Fund (LABF) violated the pension protection clause of the Illinois Constitution. The Court's decision noted (1) that both MEABF and LABF are projected by many to be insolvent in the next several years and (2) that the Act was a result of negotiations between the City and 28 of the 31 unions representing City employees in those two funds. Nevertheless, the Court ruled that the Act violated the pension protection clause of the Illinois Constitution. The 5-0 opinion affirmed the circuit court of Cook County's decision declaring the Act unconstitutional and unenforceable in its entirety.
Prior to the Act, participants in both retirement systems contributed 8.5% of their salaries toward their pensions. Among other benefits, both systems provided for 3% compounded automatic annual increases (AAI) beginning after members completed one full year of retirement. The City funded the retirement systems primarily from property tax proceeds based on a multiple of employee contributions. The fixed tax multiplier established in the pension code was not sufficient to meet the projected benefit payments required of the MEABF and LABF. With respect to the fiscal health of the funds, Justice Theis wrote, "It was undisputed that if the funds remained on the same trajectory, they would continue to pay out more in benefits than they received in contributions and investment returns, leading to a path of insolvency."

To address the fiscal conditions of the MEABF and LABF, the Act increased the 8.5% employee contribution by .5% each year beginning in 2015 until their contribution reached 11% of their salary. The Act also reduced the automatic annual increases (AAI) from 3% compounded to 3% or half the Consumer Price Index, delayed the time when a retiree would first become eligible for an AAI and eliminated the AAI altogether in specific years. Under the Act, the City's funding requirement was increased annually leading to actuarially based funding beginning in 2021 to bring the fund to a 90% funded ratio in 2055. To ensure payment of the statutory funding, the Funds were given the authority to certify delinquent amounts to be withheld and deposited into the Funds from the State Comptroller and also initiate a mandamus proceeding with the court to order a reasonable payment schedule. The new statutory funding enforcement mechanisms were significant in light of the City's argument that under Article 22, of the Pension Code, the debts of the pension funds were not to be deemed a debt of the City. Therefore, the new funding mechanism conferred a net benefit to participants by saving them from insolvency.

The Court ruled the City's net benefit argument was inconsistent with the Illinois Constitution which mandates members of the Funds have "a legally enforceable right to receive the benefits they have been promised, not merely to receive whatever happens to remain in the Funds." The Court reiterated "the clause was intended to force the funding of the pensions indirectly, by putting the state and municipal governments on notice that they were responsible for those benefits." *McNamee* v. *State*, 173 Ill. 2d 433 (1996).

As to the City's argument the Act represented a bargained for exchange with 28 out of 31 unions, the Court said, "nothing prohibits an employee from knowingly and voluntarily agreeing to modify pension benefits from an employer in exchange for valid consideration from the employer." *Kraus v. Bd. of Trustees of the Police Pension Fund*, 72 Ill. App.3d 833, 849 (1979). However, even taking the facts as presented by the City as true, the Court held
members of the Funds did not bargain away their constitutional rights in the process. The Court concluded the unions were not acting as agents in the collective bargaining process but as an advocacy group due to the fact that the individual members have done nothing that could be said to have assented to the new terms provided for in the Act.

In conclusion, the Court ruled that given the failure of the City's net benefit argument combined with the resulting diminishment not resulting from valid collective bargaining, the reduced automatic annual increases (AAI) and increased employee contributions required by the Act amounted to a diminishment or impairment of benefits in violation of the pension protection Clause in Article XIII, Section 5 of the Illinois Constitution. The Court therefore held the Act unconstitutional in its entirety. ❖

Officer Receiving Line of Duty Disability Not Entitled to PSEBA Benefits

Vaughn v. City of Carbondale, 2016 IL 119181

Officer Jeffery Vaughn suffered a head injury while reaching into his squad car for his police radio to respond to a request from dispatch. Based on this injury, Vaughn applied for line of duty disability pension benefits. The pension board denied Vaughn's application and he appealed. In an unrelated appeal, the Appellate Court affirmed the reversal of the pension board's denial and ordered Vaughn be granted a line of duty disability pension. Based on his receipt of a line of duty disability pension, Vaughn requested the City of Carbondale ("City") provide him with benefits under PSEBA. The City provided Vaughn and his wife with health insurance, without objection. In 2012, the pension board directed Vaughn to submit to an annual examination to determine continuing eligibility for his line of duty disability pension benefits. The examining doctor determined Vaughn was no longer disabled and the pension board issued a decision terminating Vaughn's disability pension benefits. The Appellate Court reversed the pension board decision because Vaughn had not been given due notice and an opportunity to be heard.

The Appellate Court determined, based on its decision to reinstate his line of duty disability pension benefits, Vaughn had suffered a "catastrophic injury" as required under PSEBA and continued to be eligible for health insurance coverage under PSEBA. The Appellate Court found Vaughn's work-related injury "occurred as a result of his response to what he reasonably believed was an emergency." 2015 IL App (5th) 140122, ¶12. The Appellate Court included extensive discussion of the definition and application of the requirement of the injury occurring in response to an "emergency." The Appellate Court found the undisputed facts demonstrated Vaughn had met the requirements for "catastrophic injury" occurred in responding to an "emergency." The City filed a Petition for Leave to Appeal to the Illinois Supreme Court, which was granted.

The Illinois Supreme Court reversed the Appellate Court and held, "the facts of this case do not fit within the emergency situation set forth in section 10(b)." 2016 IL 119181, ¶42. The Supreme Court specifically found responding to a call from dispatch does not equate to an event "reasonably believed to be an emergency." See 820 ILCS 320/10. The Supreme Court noted, "That a call from dispatch could evolve into an emergency situation for purposes of Section 10(b) of the Act does not mean that every call from dispatch is an emergency situation until proven otherwise. Answering a call from dispatch is not an unforeseen circumstance." *Id.* The Court found telling the lack of facts to established any imminent danger to person or property which required an urgent response to the call from dispatch.

In finding Vaughn was not entitled to a permanent injunction, which would have enjoined the City from terminating his benefits under PSEBA, the Court noted Vaughn "was not eligible for insurance benefits under section 10 of the Act in the first place." 2016 IL 119181, ¶47. Therefore, the City was not prohibited from terminating benefits it was never statutorily obligated to provide.

Finally, the Supreme Court found that equitable estoppel did not prevent the City from terminating Vaughn's benefits under PSEBA. The Court noted Vaughn had options available for continuing

health insurance under either COBRA or the Affordable Care Act, and therefore was not detrimentally affected by the Court's ruling. "The fact that plaintiff now will have to pay some or all of his health insurance premiums does not constitute a detrimental change in position for purposes of equitable estoppel, let alone rise to the level of fraud or injustice." 2016 IL 119181, ¶50. The end result is Vaughn's benefits under PSEBA can be terminated, because his injury was not found to meet the requirements of Section 10 of the statute.

Appellate Court Finds Service as "Chief Administrator" Not a Re-entry into Active Service

Cronholm v. Bd. of Trustees of the Lockport Fire Protection Dist. Firefighters' Pension Fund, et al., 2016 IL App (3d) 150122

Robert Cronholm retired as Chief of the Lockport Fire Protection District and began collecting his Article 4 pension benefit. Following his retirement as fire chief, he started a new job as "chief administrator" with the Fire District. In his new capacity as chief administrator, Cronholm no longer responded to fire calls, did not investigate fires, did not engage in code enforcement, nor did he have an emergency response vehicle. He no longer made contributions to the Pension Fund.

The Pension Board requested a DOI advisory opinion on whether Cronholm's service as chief administrator constituted a reentry into active service pursuant to Section 4-117 of the Pension Code. The DOI responded that because the position of fire chief and chief administrator were substantially the same, it constituted a reentry into active service and should operate to suspend Cronholm's retirement benefit. As a result of this opinion, the Fire District created yet another new position of "administrator". Upon review of that job description of the position, the DOI advised it would not constitute a reentry into service.

Firefighters with the District filed a lawsuit alleging the Pension Board breached its fiduciary duty by finding Cronholm did not re-enter active service. Following an evidentiary hearing, the Pension Board adopted the DOI advisory opinion finding Cronholm re-entered active service for the period during which he served as chief administrator. It therefore ordered the pension benefits paid to him during that period be repaid to the Pension Fund.

The Appellate Court disagreed with the DOI and found Cronholm's acceptance of the position of chief administrator did not constitute a reentry into active service. It reversed the decision of the Pension Board. The Court found the statutory language defining a firefighter as "Any person……. whose duty is to participate in the work of controlling and extinguishing fires at the location of any such fires" controlling. (See 40 ILCS 5/4-106(a)). Because Cronholm's position did not include any duty to control or extinguish fires at the location of a fire, he no longer met the definition of a "firefighter" under Article 4 of the Pension Code. As such, he could not have re-entered active service necessitating suspension of his Article 4 pension benefit.

One justice dissented noting no evidence was presented Cronholm performed the duties of a firefighter as defined by the statue during his time as Fire Chief. As such, Justice Schmidt agreed with the DOI opinion that the position was essentially the same as the job of fire chief and would have found a re-entry into active service occurred thereby suspending Cronholm's pension benefit.❖

Appellate Court Upholds Termination of IMRF Pension Benefit

Sheahan v. Illinois Municipal Retirement Fund Bd. of Trustees, 2016 IL App (2d) 151127-U

In a Rule 23 Opinion, the Second District Appellate Court found the IMRF Board correctly terminated the pension benefit for Thomas Sheahan. Sheahan accumulated service with several law enforcement agencies. When he became police chief in Oak Brook, a statutory amendment opened a window to allow him to transfer his accumulated prior service into IMRF. As a result, upon retiring from Oak Brook after six years of service, IMRF informed the Village of a significant unfunded pension liability resulting from Sheahan's retirement.

The Village sued and the Appellate Court found the transfers of service from the other funds to IMRF were invalid. It ordered his IMRF pension terminated and the monies transferred to IMRF for the prior service to be sent back to the prior funds. (See *Village of Oak Brook v. Sheahan*, 2015 IL App (2d) 140810).

In this subsequent case, Sheahan sued IMRF arguing it should be estopped from terminating his pension. In part, he argued IMRF should not be allowed to terminate his pension because the information he relied on to effectuate the transfer of service (later found to be erroneous) was provided by IMRF. Sheahan also argued IMRF could not change his pension because more than 35 days had passed since the IMRF administrative decision granting his benefit.

In rejecting his arguments, the Appellate Court first found the 35-day argument without merit. While more than 35 days had passed from the IMRF grant of Sheahan's pension in 2013, a timely appeal was taken from that final administrative decision by the Village of Oak Brook. As such, terminating the pension at this stage did not run afoul of the 35-day rule because a timely appeal had been filed. In short, the Appellate Court found its earlier determination the service credit transfers were invalid preluded IMRF from paying Sheahan's pension. The action to terminate his IMRF pension merely enforced the prior Appellate Court judgment.

As to Sheahan's estoppel argument, the Court found, "estoppel does not apply where the agency regulation upon which the plaintiff relies conflicts with a statute." *Village of Westmont v. IMRF*, 2015 IL App (2d) 141070, ¶25. The Court found in the first *Sheahan* case the transfers were not completed in accordance with the statute. Even though the instructions as to how to effectuate these transfers were provided by IMRF, the statute still controls despite IMRF's mistaken interpretation of the same.

Finally, the Court dismissed Sheahan's argument termination of his IMRF pension violated the Pension Protection Clause of the Constitution by diminishing his benefit. The Court found that because Sheahan was never entitled to any IMRF benefit in the first place, his benefits had not been diminished or impaired in any way. While the Pension Code creates enforceable contractual rights, the IMRF Board's erroneous interpretation of the Pension Code did not.

Rejecting all his arguments, the Appellate Court reversed the ruling of the trial court and found IMRF properly terminated Sheahan's pension benefit thereby effectuating the judgment order entered in the prior appeal brought by the Village of Oak Brook. ❖

Employee Grievance Report Resulting in Officer Discipline Subject to FOIA

Peoria Journal Star v. City of Peoria, 2016 IL App (3d) 140838

Following a string of recent cases holding reports about police misconduct subject to the FOIA, in this case the Third District Appellate Court found special reports authored by a Peoria police sergeant that resulted in internal disciplinary cases against two other officers were not exempt from the FOIA.

A reporter for the Peoria Journal Star submitted a FOIA request to the City seeking reports written by a specific sergeant dealing with "on-the-clock activates of the Target Offender Unit". In response, the City identified two reports as responsive. It produced one of the reports but withheld the other stating it was exempt from the FOIA as a record relating to adjudication of employee grievance or discipline pursuant to Section 7(1)(n) of the FOIA.

The Appellate Court agreed with an opinion issued by the Public Access Counselor finding the record withheld was not exempt from the FOIA. Citing the recently decided *Kalven* case, the Court noted complaints or grievances are part of an investigatory process separate and distinct from disciplinary adjudication. A complaint or grievance that results in a disciplinary proceeding is not exempt because the disciplinary proceeding is a separate matter.

Applying the *Kalven* case to this matter, the Court found the grievance report was created well before any adjudication took place and existed independent of any discipline proceeding. As such, it was not exempt from the FOIA as a records relating to adjudication of employee grievance or discipline and should have been produced. ❖

Appellate Court Affirms Denial of PSEBA Benefits

Hancock v. Village of Itasca, 2016 IL App (2d) 150677

David Hancock was an Itasca Police officer, who suffered injury to his right hand during an exchange of gunfire with a bank robbery suspect in April 1992. Hancock recovered to full active duty in May 1994. Hancock suffered further injury to his right hand in January 2000 when he was involved in an on-duty motor-vehicle accident. After recovering, Hancock again returned to full active duty. In November 2000, Hancock attempted to draw his firearm while in pursuit of a motorist and experienced difficulty with his grip, nearly dropping his firearm. Hancock was found unfit for duty and was awarded a line-of-duty disability pension in June 2001, with the pension board finding the disability was a result of the April 1992 injury.

In December 2000, Hancock's attorney requested the village pay for Hancock's health insurance premiums pursuant to the Public Safety Employee Benefits Act ("PSEBA"). The village denied the benefits, claiming Hancock was injured prior to the effective date of the PSEBA statute.

The Second District Appellate Court affirmed summary judgment in favor of the Village on Hancock's claims for declaratory judgment and *mandamus*. The circuit court found Hancock was ineligible for benefits under PSEBA due to the date of his injury and Hancock's claims were barred by the five-year statute of limitations for claims under PSEBA. PSEBA went into effect on November 14, 1997, and provides: "An employer who employs a full-time law enforcement, correctional or correctional probation officer, or firefighter, who on or after the effective date of this act 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 circuit court rejected Hancock's argument his injury, which was not catastrophic in 1992, manifested into a catastrophic injury by November 2000.

The Appellate Court did not opine regarding when or whether Hancock suffered a catastrophic injury. Instead, the Appellate Court affirmed entry of summary judgment against Hancock because he had failed to make his claims within the five-year statute of limitations. Hancock did not file his complaint until 2013. However, he claimed he was entitled to benefits under PSEBA in 2001. The Appellate Court disagreed with Hancock's argument that he could not have known he had a claim until the Illinois Supreme Court had issued its ruling in *Nowak v. City of Country Club Hills*, 2011 IL 111838, which provided a municipality becomes obligated under PSEBA once it is determined the officer is permanently disabled and eligible for a line-of-duty disability pension. The Appellate Court rejected Hancock's argument, finding the "discovery rule" as applied to statutes of limitations is not extended while a party waits for other cases to be decided by the courts. The Appellate Court specifically noted nothing in the *Nowack* decision was particularly germane to Hancock's claims. ❖

Illinois Supreme Court Rules on CTA Retiree Health Benefits

Matthews v. Chicago Transit Authority 2016 IL 117638

On May 5, 2016, the Illinois Supreme Court issued its ruling regarding claims raised by current and former employees of the Chicago Transit Authority ("CTA") relating to changes to the health care benefits under the retirement plan. Following the expiration of the 2004 collective bargaining agreement between the CTA and the Transit Unions, the retiree health benefits were subject to an arbitration award, which modified the retiree health care benefits. Plaintiffs file their lawsuit challenging the implementation of the arbitration award.

In issuing the arbitration award, the arbitration panel noted jurisdiction to resolve the dispute was conditioned on the passage of legislation codifying the arbitration award. In January 2008, the legislature passed such legislation incorporating a memorandum of understanding between the unions and the CTA, which adopted the arbitration award findings. The memorandum of understanding contained further language stating: "The parties further acknowledge their intention that the Legislation not be construed as a diminution of the rights, privileges and benefits under the existing CBA's between them or of the Arbitrator's Opinion and Award."

Plaintiffs' class action complaint brought claims the legislation violated the Illinois Constitution by diminishing or impairing their health care benefits and for promissory estoppel, breach of contract,
breach of fiduciary duty, and declaratory judgment. Plaintiffs were represented in two classes, Class I consisting of retirees and a Class II consisting of current employees The CTA filed motions to dismiss the claims. The circuit court held the Class I had standing to bring their claims, but the Class II lacked standing to challenge the arbitration award, as they were represented by their unions. However, the circuit court dismissed the complaint in its entirety finding it failed to state a claim upon which relief could be granted. The Appellate Court affirmed the lack of standing of the current employees but reversed the ruling against the retirees, finding they had a vested right to receive the benefits promised and were entitled to pursue the claims.

The Supreme Court affirmed dismissal of the Class II plaintiffs for lack of standing, finding they were represented by their respective unions during the arbitration process. Only the employer or designated representative of the bargaining unit have standing to challenge an arbitration award in circuit court. Because the Class I members were no longer represented by any collective bargaining unit, they had standing to challenge the arbitration award, which impacted their retiree health care benefits.

The Supreme Court held the circuit court erred in dismissing the Class I plaintiffs' claims, as their rights had vested and could not be diminished. The Supreme Court analyzed the Class I members' claims in light of the pension protection clause of the Illinois Constitution, noting none of its precedent cases (*Kanerva*, *Jones*, or *In re Pension Reform Litigation*) addressed a similar situation involving retiree health care benefits provided via a collective bargaining agreement and modified through collective bargaining.

The Supreme Court noted if a collective bargaining agreement provides certain retirement benefits may be modified at a future time, the pension protection clause does not prohibit such modifications if they are provided for in the underlying collective agreement. "Nothing in the pension protection clause requires or permits a court to rewrite the terms of such an agreement. For those public servants whose employment is governed by a contract, such as a CBA, the pension protection clause guarantees the retirement benefits that are provided in their employment contract…If the underlying contract allows for the modification of certain retirement benefits, the pension protection clause does not preclude modification or alter the essential nature of the rights granted under the contract." In concluding the Class I members' rights vested, the Supreme Court stated, "the contractual right to retiree health care benefits under the 2004 CBA was fully accrued and was not modified by agreement or the 2007 arbitration." The Supreme Court remanded the case to the Appellate Court with instructions to remand to the circuit court for further proceedings regarding the Class I plaintiffs' claims to vested retiree health care benefits. ❖

Information Contained Within Database Subject to FOIA

Hites v. Waubonsee Community College
2016 IL App (2d) 150836

Requests for records stored electronically under the FOIA are frequently troublesome. In this case, the requestor sought the zip codes of individuals taking certain classes at Waubonsee Community College, the total number of students falling into several distinct categories and the "raw input" for data fields contained on certain student registration forms.

The college responded by stating it "does not aggregate this information" and as such, no document is responsive to your request. In dismissing the lawsuit filed by the requestor, the Circuit Court dismissed those portions of the FOIA request seeking aggregate information the college did not maintain. Likewise, it found the college did not have a duty to search its database for information stored responsive to the request even though testimony established it included data points responsive to the request. Finally, it found the request unduly burdensome because copying and redacting the physical records would outweigh the public's interest in the requested information.

The Appellate Court affirmed in part and reversed in part. The Appellate Court found the dismissal of the requests for aggregate information not maintained by the college appropriate because it would require the college to create a new record in response to the request.

However, as to the requests for zip codes and raw input data contained in college databases, the Appellate Court found those subject to the FOIA. First, the Appellate Court found the electronic data Points contained in the databases subject to the FOIA as public records. It further found searching that database, or even applying programming or codes to retrieve the information, does not constitute creation of a new record. Rather, it is akin to searching for a file in a file cabinet. The Appellate Court did adopt a fine line distinction from a body of Federal FOIA case law that creation of a listing or index of information stored in a database is the creation of a new record. However, a request seeking information about the contents of the database itself (even if requiring an electronic search) is a valid request under the FOIA.

The implications of this recent decision have come into play frequently in recent weeks with a mass FOIA request sent to many of our pension board clients seeking information about members typically found in the DOI annual report. Boards should remember that requests for records in a specific electronic format need only be produced in that format if the Fund is storing them in the format requested. While the FOIA does not require a public to create a record to respond to a request, in some instances this may be the easiest option for response. As always, each request is unique. If you receive a FOIA request and have any questions, please do not hesitate to contact RDK attorneys.❖

Appellate Court Affirms Denial of PSEBA Benefits in Rule 23 Decision

The Second District Appellate Court recently affirmed the denial of health insurance benefits under the Public Safety Employee Benefits Act ("PSEBA") to a firefighter injured while responding to an "invalid assist" call, in *Wilczak v. Village of Lombard*, 206 IL App. (2d) 160205-U (Sept. 30, 2016). The Appellate Court's ruling does not have precedential effect, as it was issued as a Rule 23 decision.

On August 15, 2009, Firefighter Kenneth Wilczak was dispatched to an "invalid assist" call involving a victim with multiple sclerosis who was stuck between his bed and a wall. FF. Wilczak injured his shoulder when attempting to relocate the victim into his bed. Department policies required the ambulance to utilize its lights and siren when proceeding to the call and required FF Wilczak and his partner to treat the call as an emergency. The Lombard Firefighters' Pension Fund granted Wilczak's application for line of duty disability benefits.

In affirming Lombard's denial of benefits, the Appellate Court focused on the nature of the response call for an "invalid assist." The Appellate Court agreed with the village, the call was not for an emergency, even though fire department regulations required Wilczak to treat it as an emergency. The Appellate Court noted, DuComm protocols required the dispatcher to verify the invalid was not sick or injured and only needed assistance moving from one place to another, and that DuComm included the nature of the call in the initial dispatch. In affirming summary judgment in favor of Lombard, the Appellate Court noted Wilczak "could not have reasonably believed that he was responding to an emergency when he sustained his injury." The Appellate Court's reasoning was based, in part, on testimony from Wilczak indicating he had determined "the disabled citizen was not injured and did not require medical attention." The Appellate Court concluded, "There was no imminent danger that required immediate action." Therefore, Wilczak did not meet the requirements for entitlement to PSEBA benefits. ❖

PAC Finds CPD Emails Sent on Personal Devices Subject to FOIA

PAC Opinion 16-006

A CNN reporter sent a FOIA request to the Chicago Police Department (CPD) seeking emails related to Laquan McDonald from both police department and personal emails accounts for 12 specific officers during a specific time period. CPD responded to the request with a limited number of emails but no explanation of what was searched or what emails were withheld.

On appeal to the Public Access Counselor (PAC), it was learned CPD searched its own email system but not the personal email accounts of the officers named in the request. CPD asserted emails stored and sent on personal accounts were not "public records" under the FOIA.

Based on prior case law finding city council members texts to one another on their personal cell phones sent during a city council meeting subject to the FOIA, the PAC first found that a public employee acting in an official capacity is transacting public business of the public body subjecting those communications to the FOIA. Next, it found the emails to be public records possessed by the CPD even though not stored on its servers.

Because CPD did not conduct any search of the personal emails of the officers, the PAC found it failed to conduct an adequate search for records in violation of the FOIA. The PAC also found CPD failed to conduct an adequate search for records responsive to the request on its own servers because it simply searched the term "Laquan McDonald". The PAC held the FOIA required CPD to expand its search of its own email server to include alternate spellings, references to the incident, involved officers, incident location and/or physical description of McDonald.

While CPD argued requiring it to search officers personal email would subject officers to invasions of personal privacy, the PAC noted only those personal emails pertaining to the transaction of public business are records subject to the FOIA. Not all communications sent or received on the private device would be subject to the FOIA, only those pertaining to the transaction of public business. Depending on the circumstances, an order directing the officers to produce any responsive emails from their personal emails may suffice.

This binding PAC Opinion adds to the growing body of opinions and recent case law finding communications sent or stored on private device subject to the FOIA if the subject matter "pertains to the transaction of public business".❖

Local Government Travel Expense Control Act

P.A. 99-604

The legislature recently passed an Act requiring non-home rule units of local government to regulate travel, meal, and lodging expenses of officers, employees, and members of governmental bodies. The Act requires the local governmental units to pass a resolution specifying the types of business for which travel, meal, and lodging expenses are allowed, the maximum allowable reimbursement for those expenses, and a standard form for submission of reimbursement. The Board must approve by a roll call vote any expenses in excess of the amounts set forth in the resolution. In addition, before any expense is approved for reimbursement specific documentation must be presented to the governing board including either an estimate of the reimbursement (if not yet incurred) or a receipt (if already paid), the name of the individual requesting the reimbursement, the office of the individual requesting reimbursement, and the dates applicable. The bill is effective January 1, 2017. ❖

New Chicago Pension Legislation

P.A. 99-506

Senate Bill 777 was enacted on May 30, 2016, as Public Act 99-506, overriding a veto by Governor Rauner, amending certain sections of Article 5 and Article 6 of the Illinois Pension Code. Among the amendments in the statute, Article 5 of the Pension Code was amended to ensure all City of Chicago police officers and firefighters retired before January 1, 2016, over age 50 and with 20 years of service, or retired due to termination of disability receive an annuity equaling at least 125% of the Federal Poverty Level.

The statute also established annual minimum contributions to the Policemen's Annuity and Benefit Fund for 2016 ($420,000,000), 2017 ($464,000,000), 2018 ($500,000,000), 2019 ($557,000,000), and 2020 ($579,000,000). The statute similarly established annual minimum contributions to the Firefighters' Annuity and Benefit Fund for 2016 ($199,000,000), 2017 ($208,000,000), 2018 ($227,000,000), 2019 ($235,000,000), and 2020 ($245,000,000).

The statute further requires the City of Chicago to levy a tax annually in an amount at least equal to the normal cost of the pension fund and an annual amount sufficient to bring the total assets of the fund up to 90% by the end of fiscal year 2055. This amendment added an additional 15 years for Chicago to reach the 90% funded level.

These amounts are now to be calculated by either the Department of Insurance or an enrolled actuary retained by the Fund. Chicago no longer has the ability to rely on an enrolled actuary retained by the city. The statute further requires the minimum
employer contribution levels to be calculated "each year as level percentage of payroll over the years remaining up to and including the fiscal year 2055 and shall be determined under the entry age normal actuarial cost method."

Notably the statute requires any proceeds received by the City of Chicago from the operation of a casino(s) within city limits shall be expended by the city for payment to the Policemen's Annuity and Benefit Fund of Chicago and Firemen's Annuity and Benefit Fund of Chicago to satisfy the city contribution obligation in any year."

The statute also established a right for the pension funds to bring a mandamus action to compel the city to make the requisite payments, if Chicago fails to pay the amounts due under the statute by December 31 of each year.❖

Municipality Sanctioned for "Deliberately" Choosing to Underfund Police and Fire Pension Funds

Village of North Riverside v. Ill. Dept. of Insurance, 2016 IL App (1st) 152687

On December 19, 2016, an Illinois Appellate Court issued a decision regarding underfunded Illinois police and fire pension plans. At issue was the Village of North Riverside's underfunding of its Article 3 and 4 pension funds. The result may prove to be helpful in further defining public employers' obligations to fund police and fire pension plans.

Municipalities and fire protection districts ("employers") are required to contribute to police and fire pension funds. More particularly, the Pension Code mandates they pay an amount sufficient to cover the "normal cost" remaining after employees' contributions are accounted for. The Illinois Pension Code empowers the Department of Insurance ("DOI") to deal with an employer's failure to contribute sufficient funds to cover the normal cost.

Should DOI determine an employer is non-compliant, the Director of the DOI may hold a hearing where the employer must show its cause for non-compliance. If, following the hearing, the Director determines the employer does not have good and sufficient cause for non-compliance, the Director is empowered to order compliance and assess penalties.

In North Riverside, the Village was found to be non-compliant. At hearing, the Village presented evidence showing its revenues followed the recession. The Village showed it suffered reduced sales tax, property tax, and shared revenue from the State. The Village, a unit of home-rule government, was also hindered by tax caps, which limited its ability to achieve additional revenue from property tax. The Village claimed these economic difficulties existed from its statutory obligation to properly pay into the police and fire pension funds.

At hearing, DOI presented evidence regarding North Riverside's history of funding its police and fire pension funds. "The evidence showed that there were ways in which the Village could have raised additional funds. The hearing also revealed that the Village in fact not only missed payments late in the decade as they were charged with doing, but in fact made no annual contribution six times between 2000 and 2011 and made less than the full contribution in three of the other years." At the same time, the Village made all of its payments to IMRF. The Village explained it funded IMRF "because that fund has an enforcement provision."

In light of the evidence, the hearing officer concluded the Village of North Riverside was non-compliant. The hearing officer issued an order of compliance. The Village then filed a complaint for administrative review in the Circuit Court of Cook County. That complaint was denied. The Circuit Court affirmed the hearing officer's order. The Village then appealed.

On appeal, the Appellate Court considered the Village's argument about its claimed "inability to pay." Responding to this claim, the Appellate Court noted, "the hearing officer, and thereafter the Director by ratification, heard all of the evidence and found that the Village had simply made choices to allocate funds elsewhere in derogation of its statutory duties." The Appellate Court concluded, the Village position "shows a conscious choice in the Village's allocation of resources

and acknowledges a deliberate effort to allocate resources other than the police and firefighter pension funds."

The Appellate Court upheld the Circuit Court and hearing officer's finding of non-compliance by the Village. The Appellate Court explained, "The Village, as all government units, has to make choices where to spend money. And here there was evidence that the Village spent its money on discretionary endeavors it prioritized more than contributing to the police and firefighter pensions." The Appellate Court concluded, "That is a violation of the Pension Code."

This is one of the first appellate cases to deal with DOI's power to sanction underfunding municipalities and fire protection districts. What if any sanction will be issued? The statute permits a maximum civil penalty of $2,000 "for each noncompliance with the Director's order." This coupled with the newly effective mandatory funding portion of the Pension Code will begin to address delinquent employers that have consistently chosen to not fund police and fire pension systems. ❖

Reversal of Board Decision Denying Line of Duty Benefits

Hopkins v. Bd. of Trustees of the Firefighters Pension Fund of the City of East St. Louis, 2016 IL App. (5th) 160006

Captain Larry Hopkins sought line of duty disability pension benefits based on the cumulative effects of two on-the-job injuries he suffered. Following a hearing, the Pension Board unanimously found Hopkins failed to meet his burden he suffered a line of duty disability.

Hopkins was first injured in 2009 when an overhead door hit him in the head while he was fighting a structural fire. Hopkins suffered a second head injury in 2011 when an object (presumed to be a brick or piece of concrete) was blown off a building that was on fire and hit him in the head. Hopkins ultimately underwent discectomy surgery and was returned to work without restrictions. Following his return to work Hopkins testified before the Pension Board the symptoms relating to his head injuries reoccurred.

Hopkins underwent three independent medical exams relating to his application for line of duty disability benefits. All three doctors uniformly found Hopkins unable to perform full and unrestricted firefighting duties and further found his disability related to the head injuries he suffered. Two of the doctors also provided supplemental reports finding Hopkins secondary employment at a steel company did not change their opinion regarding his disability. The Pension Board also admitted the report of the doctor from Hopkins' worker's compensation claim, who found Hopkins unfit to be a fireman even before his 2009 injury.

Following the hearing, the Pension Board found Hopkins was disabled but his disability was not the result of an act of duty. On administrative review, the circuit court noted the Pension Board did not rely on the opinions of the three independent medical exams but instead relied on the worker's compensation doctor's report, "who had not seen plaintiff since October 2009 when the City hired him to give a report for its defense of plaintiff's worker's compensation claim." The circuit court reversed the Pension Board's decision as clearly erroneous in its reliance on the worker's compensation doctor's report. The City sought review by the Appellate Court.

In affirming the reversal, the Appellate Court noted the worker's compensation doctor was "not in actuality an impartial physician, but a paid expert who was hired to testify on behalf of the City in its defense of plaintiff's worker's compensation claim based upon plaintiff's July 5, 2009 accident." The Appellate Court found, "The Board was wrong to rely on the opinion of Dr. Katz, who was unaware of key relevant and material facts in this case." The Appellate Court opined section 4-112 required the Pension Board must consider the opinions of the three physicians selected by the Pension Board. The Appellate Court confirmed the appropriate standard of review was the manifest weight of the evidence and found the Pension Board's denial of line of duty benefits was against the manifest weight of the evidence.❖

Public Recital of Nature of Act Must be Made Before Vote

Allen v. Clark County Park Dist. Bd. Of Commissioners, 2016 IL App. (4th) 150963

In February 2015, the Clark County Park District Board of Commissioners conducted its regularly scheduled meeting, which included two items on its agenda: "X. Board Approval of Lease Rates" and "XI. Board Approval of Revised Covenants". Following motions, the Board voted to approve the lease rates and revised covenants. A member of the public then asked the Board to describe what it had just voted on. The Board did not provide any substantive answer to the question from the public.

Plaintiffs initially filed a *pro se* complaint alleging the Board had insufficiently set forth the subject matters for agenda items X and XI and did not otherwise explain the nature of the items before voting. Plaintiffs later secured an attorney to represent them who ultimately filed a second amended complaint claiming various violations of the Open Meetings Act ("OMA"), including Count III which claimed the Board violated section 2(e) of the OMA. Section 2(e) requires the Board to give a sufficient public recital of agenda items before taking public action. The Board filed a motion to dismiss, which was granted by the circuit court. Plaintiffs took their appeal regarding dismissal of Count III of their second amended complaint.

Section 2(e) of the OMA provides: "Final action. No final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." 5 ILCS 120/2(e). After reviewing the intent of the statute and the limited case law addressing Section 2(e), the Appellate Court reversed the dismissal of Count III.

The Appellate Court found the Board's actions "insufficient" to meet the requirements of Section 2(e). The Appellate Court relied in part on an opinion from the Illinois Attorney General which stated: "public recital must include the key terms of the proposed public contract or agreement." The Appellate Court found the Board's introductions of agenda items X and XI "did not provide the public any of the key terms of the lease agreements or covenants." A detailed explanation was not required, but the public body "may not provide no details at all." ❖

NOT SURE IF YOU WANT TO USE THIS ONE – KAK MENTIONED SUBSEQUENT SUPREME COURT CASE MAY HAVE ABROGATED OR IMPLICITLY REVERSED

Individuals Not Proper Defendants in FOIA Action

Korner v. Madigan et al., 2016 IL App. (1st) 153366

The First District Appellate has confirmed only public bodies are proper defendants in an action brought under the FOIA. Individual public officers cannot be sued. The Plaintiff sent a FOIA request
to the Illinois Department of Financial and Professional Regulation (IDFPR) seeking records related to an investigation she initiated into several veterinarians who treated her dog. She filed a lawsuit in the Circuit Court of Cook County seeking access to the records requested when IDFPR withheld the records requested. Her suit named only individuals in their official capacities who held various positions at the Attorney General's Office and IDFPR.

While the trial court denied a motion to dismiss and entered judgment for the defendants on summary judgment, the Appellate Court found the motion to dismiss should have been granted. It found Illinois' FOIA is based on the Federal FOIA under which only agencies, not individuals can be sued. Because Korner named only individuals and no public bodies, her complaint should have been dismissed for failure to name a proper defendant. ❖

Appellate Court Allows Amendment of Complaint After Failure to Name Necessary Parties on Administrative Review

Grady v. Illinois Dept. of Healthcare and Family Services, et al., 2016 IL App (1st) 152402

Reaching an opposite conclusion from the 4th District Appellate Court in a case featured in our July 2015 newsletter, the 1st District Appellate Court affirmed the need to properly name parties in a case for administrative review but allowed the Plaintiff the ability to amend her Complaint within 35 days pursuant to the statute. In so ruling, the 1st District acknowledged it is at odds with the case of *Mannheim School Dist. No. 83 v. Teachers' Retirement System*, 2015 IL App (4th) 140531 which found a party is only able to take advantage of the ability to amend to add a necessary party under limited circumstances.

The first paragraph of Section 3-107(a) of the Administrative Review Law requires the administrative agency and all persons who were parties of record to the administrative proceedings to be made defendants. The second paragraph of 3-107(a) provides no action for administrative review shall be dismissed for lack of jurisdiction based on failure to name an employee, agent, or member as long as the administrative agency has been properly named. The third and final paragraph of 3-107(a) provides if it is discovered an agency or party of record to the administrative proceeding was not made a defendant "as required by the preceding paragraph" the court shall give the Plaintiff 35 days in which to name the missing party as a defendant.

In this case, the Plaintiff filed an appeal of a decision regarding her eligibility for a Medicaid program. Her complaint named the Illinois Department of Healthcare and Family Services and its director as defendants. She did not name the Illinois Department of Human Services or its head as a defendant. As a result, the trial court dismissed her complaint for failure to name a required party. Based on the *Mannheim* case, it also denied her the ability to amend her complaint to correct the error.

The Appellate Court agreed Plaintiff failed to name a necessary party however, it found the *Mannheim* case wrongly decided and allowed her to amend her complaint to add the missing agency. In examining the language and legislative history of Section 3-107(a), the Appellate Court focused on the language contained in paragraph three allowing amendment if a defendant was not named "as required by the preceding paragraph." While the *Mannheim* Court found "preceding paragraph" referred to paragraph two thereby allowing amendment only in situations where the proper agency and/or agency head has been named, the First District here found "preceding paragraph" instead referred to paragraph one. Amendment should therefore be allowed when a necessary party is not named at all.

The First District reasoned this is the correct interpretation because the second paragraph was added by a 2008 amendment. Prior to 2008, the "preceding" language referred to what is now paragraph one of Section 3-107(a). It also found the 4th District's reading of the Section would permit amendment only in situations where amendment is not necessary as naming an agency head shall be read to include the agency itself. It
therefore, found the Plaintiff should have been granted 35 days to amend her complaint to add the missing defendants.

Inasmuch as both this case and the *Mannheim* case turn on technical distinctions of the Administrative Review Law, neither make for particularly interesting reading. However, failure to properly follow these required steps can lead to dismissal of an administrative review complaint without leave to amend (at least under the 4th District's reasoning). Since there is now a split between two appellate districts on how to apply this statute, it will be interesting to see if the State appeals this case to the Illinois Supreme Court for a final determination on the matter. ❖

PSEBA Benefits Not Available for Civilian Paramedic

Mitchell v. Village of Barrington, 2016 IL App. (1st) 153904

Jodie Mitchell began her employment with the Village of Barrington in 1988 as a "paramedic." Michell did not undergo any testing or appointment by the Board of Fire and Police Commissioners. In 1999, Barrington converted its "paramedics" to firefighters. However, Mitchell's request to continue to serve as a "Civilian Paramedic" was approved by the Village. Subsequently, Mitchell's job duties were expanded to include a requirement that she assist with fire suppression and related duties.

In 2007, Mitchell injured her back when she slipped on some ice upon exiting the ambulance. Ultimately, Mitchell reached maximum medical improvement but was unable to resume her Civilian Paramedic duties. In January 2008, the Village terminated her employment due to her medical inability to perform her job duties. Mitchell's request for benefits under the Public Safety Employee Benefits Act ("PSEBA") was denied by the Village on the basis she was not a sworn firefighter and therefore was not covered under the act.

Mitchell filed a complaint seeking declaratory relief. Following discovery, the Village filed a motion for summary judgment which was granted by the circuit court. The court agreed with the Village's position Mitchell did not have the same responsibilities as a sworn firefighter and was not entitled to PSEBA benefits. The Appellate Court affirmed the grant of summary judgment in favor of the Village.

In affirming, the Appellate Court noted the Act had been modified to include an emergency medical technician, "who is a sworn member of a public fire department." The Appellate Court found Mitchell failed to present any evidence she was a full-time, sworn firefighter/paramedic as contemplated under PSEBA and noted she had twice refused the Village's offer to become a sworn firefighter/paramedic, instead deciding to remain a Civilian Paramedic. The Appellate Court rejected Mitchell's argument PSEBA should be read to include both sworn and unsworn EMTs. The Appellate Court also rejected Mitchell's claim for PSEBA benefits under a constitutional equal protection argument. ❖

Occupational Disease Insufficient for PSEBA Benefits

Bremer v. City of Rockford, 2016 IL 119889

In a 6-1 opinion, on December 30, 2016, the Supreme Court of Illinois reversed the Second District Appellate Court's holding in *Bremer v. City of Rockford*. We first wrote about this case in our July 2015 Legal & Legislative Update. This case focused on whether an occupational disease disability pension awarded pursuant to 40 ILCS 5/4-110.1 qualifies as a "catastrophic injury" under the Public Safety Employee Benefits Act ("PSEBA").

As a refresher, PSEBA entitles full-time police officers and firefighters "catastrophically injured" while responding to an emergency to free family health insurance for the remainder of their life. First responders may also qualify for PSEBA benefits when "catastrophically injured" by other specific qualifying activities articulated in 820 ILCS 320/10. In *Krohe v. City of Bloomington*, the Supreme Court held a police officer or firefighter who receives a line-of-duty disability pension is automatically deemed "catastrophically injured" for purposes of PSEBA. Not until *Bremer* had the interplay of PSEBA with occupational disease disability pensions been explored.

Bremer began his career as a Rockford firefighter in 1976. In 2005, the Rockford Firefighters' Pension Board awarded Bremer an occupational disease pension. He then sought PSEBA benefits. The City denied his application, concluding he was not "catastrophically injured" as defined by PSEBA. Bremer filed suit in circuit court seeking PSEBA benefits and other remedies. The circuit court held an occupational disease disability pension is, as a matter of law, a "catastrophic injury" as contemplated by PSEBA. The court awarded Bremer PSEBA benefits and other relief. The City appealed.

The Second District Appellate Court affirmed in part and reversed in part. The appellate court held an occupational disease disability meets the criteria of a "catastrophic injury" under PSEBA. However, that court concluded there existed a question of fact as to whether the "catastrophic injury" occurred as a result of Bremer's response to what was reasonably believed to be an emergency. The appellate court remanded the matter for further factual consideration regarding causation. Both parties then sought leave to appeal before the Supreme Court of Illinois.

The Supreme Court discussed the decisions of the pension board, City, circuit court, and appellate court. It further examined past decisions interpreting PSEBA and the term "catastrophic injury." Based upon that analysis, the Supreme Court concluded Bremer "cannot establish a catastrophic injury under [PSEBA] by simply showing that he suffered an injury resulting from his service as a firefighter or an injury that occurred in the course of his employment. Rather, he must establish an injury that resulted in a line-of-duty disability pension…"

At the outset, the Supreme Court was mindful of the burden. Unlike the Pension Code, where ambiguities are construed in favor of the beneficiary, when interpreting PSEBA the court construes it "strictly in favor" of the municipality because "it created a new liability unknown at common law."

The Court explained that since the 2003 *Krohe* decision, the term "catastrophic injury" has been defined as the receipt of a line-of-duty disability pension. As this is a long-standing definition the Court held, "Our construction of that term is considered part of the statute itself until the legislature amends it contrary to our interpretation." Going further, "We cannot expand that definition to include injuries resulting in the award of occupational disease disability pensions under section 4-110.1 without revisiting our settled determination of the legislature's intent in enacting that provision."

The Court explained the differences in qualifying criteria for a line-of-duty disability pension and an occupational disease disability pension means there is a legislative distinction between the benefits. One distinction noted by the Supreme Court is the "rebuttable presumption" given to firefighters suffering from certain statutorily annunciated cancers. Based upon these differences, the Supreme Court held line-of-duty disability and occupational disease disability pensions cannot be read to be synonymous.

Justice Kilbride was the sole dissenting justice. In his dissent, Justice Kilbride agreed an occupational disease disability pension is not automatically a "catastrophic injury" as contemplated by PSEBA. However, he opined Bremer should have been permitted to develop a factual record whereby he could prove his occupational disease would also meet the criteria of a line-of-duty disability pension. Justice Kilbride argued there are several circumstances by which an injured firefighter could qualify under both provisions of the Pension Code. As such, he felt it wrong to automatically preclude firefighters who receive an occupation disease disability when they may also have been eligible for a line-of-duty disability. This argument was not rebutted by the majority. Instead, the majority dismissed the argument on procedural grounds. As such, whether the recipient of an occupational disease disability benefit may still demonstrate he was "catastrophically injured" under PSEBA remains unclear. ❖