

LEGALINSIGHTS

FOR PENSION BOARDS

OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

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Illinois Supreme Court rules that pension funds are not liable for prejudgment interest

by Donald L. Potts

The Illinois Supreme Court recently resolved a split between the districts of the Illinois Appellate Court concerning whether a pension applicant who succeeds on administrative review is entitled to prejudgment interest. In *Kouzoukas v. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 234 Ill.2d 446 (2009), the Illinois Supreme Court held that prejudgment interest is not available in such cases.

The Illinois Code of Civil Procedure provides for post-judgment interest (interest on any judgment beginning when the judgment is entered until the judgment is paid), but does not contain any provision for prejudgment interest (735 ILCS 5/2-1303). In the past, some Illinois courts have awarded prejudgment interest to successful pension applicants based on Section 2 of the Illinois Interest Act, which states, "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing ..." (emphasis added) (815 ILCS 205/2).

The Illinois Supreme Court began its analysis with the general rule that prejudgment interest is available only when authorized by the agreement of the parties, by statute, or on equitable

grounds. The court noted that the Illinois Pension Code constitutes a written agreement between the parties, but that it does not provide for prejudgment interest. The court also noted there was no basis for an equitable award of prejudgment interest, such as purposely denying a claim the Board knew was meritorious. Therefore, the court concluded, "[I]f prejudgment interest is to be awarded, it must be because a statute authorizes it." Kouzoukas argued that the Interest Act authorized prejudgment interest, relying on a 1990 appellate court decision.

In *Fenton v. Board of Trustees of the City of Murphysboro Police Pension Fund*, 203 Ill.App.3d 714 (5th Dist. 1990), the Fifth District of the Appellate Court held "the terms and conditions of the pension fund are written in the Illinois Pension Code, ... the pension agreement is an 'other instrument of writing' under the interest statute." Based on this analysis, the court held the pension applicant was entitled to prejudgment interest when he prevailed on administrative review of his pension application.

The Illinois Supreme Court rejected the *Fenton* court's analysis, noting that statutes permitting the recovery of interest must be strictly construed. Based on this standard, the court determined that the Interest Act does not

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Court rules pension board should have held pre-deprivation hearing

by David Zafiratos

A police pension board improperly terminated a disability pension when it failed to hold a hearing prior to terminating the pension, the First District Appellate Court concluded in *Peacock v. Board of Trustees of the Police Pension Fund*, ___ Ill.App.3d ___, 2009 WL 3415679 (1st Dist. 2009). In *Peacock*, the Board of Trustees of the Village of South Chicago Heights Police Pension Fund awarded police officer Craig Peacock a disability pension in 1991 after he underwent surgery to correct a back injury. As required by Section 3-115 of the Illinois Pension Code (40 ILCS 5/3-115), Peacock underwent several medical examinations between 1992 and 2005, and continued to receive disability benefits throughout these years. In 2006, however, the treasurer of the Board notified him that the Board elected to "hold" his disability payments until he was examined by a Board selected physician. Since Peacock had reached age 49 in 2006, it was the last year the Board could require an annual review of his disability.

After discontinuing his disability pension payments, the Board scheduled an independent medical examination to determine whether he was still disabled. The IME physician examined Peacock, reviewed two prior evaluation reports, and then issued a written re-

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Teacher pension dispute proves instructive to police and fire pension board policy disputes

by Shawn P. Flaherty

A recently reported court decision involving a dispute between the City of Chicago Board of Education and its teachers' pension fund presents procedural issues of interest to Illinois Article 3 and Article 4 pension funds. In *Board of Education of the City of Chicago v. Board of Trustees of the Public Schools Teachers' Pension and Retirement Fund of Chicago*, ___Ill.App3d___, 2009 WL 2590086 (First District, August 20, 2009), the Chicago Board of Education ("Board") filed suit against the Board of Trustees of the Public Schools Teachers' Pension and Retirement Fund of Chicago ("Fund") to challenge pension payments awarded to a group of newly retired tea-

chers. The basis for the dispute was the Board's contention that the Fund utilized an unauthorized method of calculating average salaries for the retirees' pension benefits. The Board alleged the Fund's calculation method resulted in more lucrative pension payments for the new retirees than permitted under Illinois statutes.

The Cook County Circuit Court originally granted the Board's motion for summary judgment on the basis that the Fund violated the Illinois Pension Code by overpaying the teachers. The retired teachers intervened in the lawsuit seeking to bar the Board from pursuing the case on the basis that the Board did

not seek timely review of the pensions under the Administrative Review Law. (735 ILCS 5/3-101) The circuit court granted the retired teachers' motion, but dismissed the Board's complaint with prejudice. The Board attempted to amend its complaint; however, the motion to amend was denied. Subsequently, the Board filed an appeal to the Illinois Appellate Court for the First District.

Two primary issues were resolved in this case, one in favor of each side in this dispute. The appellate court rejected the Board's argument that it had authority to challenge at any time the Fund's decision

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Pre-deprivation hearing

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port to the Board, stating he could return to full, unrestricted duty as a police officer. According to the IME report, Peacock would be required to follow a simple lumbar exercise program. Based on that IME report, the Board discontinued Peacock's disability pension benefits and informed him that he could request a hearing before the Board on his disability status.

On two separate occasions, Peacock's attorney requested that the board conduct a hearing on the matter. Prior to the hearing, a second physician examined Peacock and opined he was still disabled. At Peacock's disability benefits hearing, the Board relied on the opinion of the first IME physician, found he was no longer disabled, and revoked his pension retroactive to April 10, 2006, the date of the first IME physician's report. Peacock then filed a two-count lawsuit requesting judicial review and alleging a due process violation. The circuit court ruled in favor of the Board, and Peacock appealed the court's decision.

First, the appellate court considered whether the Board's decision was against the manifest weight of the evidence. In reciting the legal standards applicable to review a pension board's finding of fact, the court explained, "[t]he decision of an administrative agency is against the manifest weight of the evidence only where the opposite conclusion is clearly evident." The court also noted the decision should be upheld if there is, "sufficient evidence in the record to support the agency's determination." Finally, the court explained that to justify a pension board's factual determination, "there need only be some competent evidence in the record to support its findings."

With these standards in mind, the court then looked to Section 3-116 of the Illinois Pension Code for the statutory requirements for the termination of a disability pension. When a police pension board determines a disability pensioner has recovered from a disability, Section 3-116 calls for the pension board

to certify to the chief of police that the officer is no longer disabled. Courts have interpreted Section 3-116 to allow a pension board to revoke a disability pension based on one medical examination. In *Peacock* since the Board discontinued his disability pension following an independent medical examination, the court determined sufficient competent evidence existed in the record to support the Board's decision.

While the court refused to overrule the Board's finding of fact that Peacock was no longer disabled, it did take issue with the Board's failure to hold a hearing prior to terminating the pension. Pension boards must provide adequate notice and a meaningful opportunity for the pensioner to be heard *prior* to terminating a disability pension. This Board provided neither adequate notice nor an opportunity for Peacock to be heard prior to terminating his pension. The Board's first notification was a letter to Peacock informing him that his disability pension was terminated. Al-

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Teacher pension dispute

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to grant higher than authorized pensions because it violated the Illinois Pension Code. Specifically, the reviewing court found that the action of the Fund was not void, but merely voidable. The distinction between these two terms is crucial. “Voidable” actions are (1) subject to the thirty-five day period for filing under the Administrative Review Law; and (2) considered erroneous decisions. On the other hand “void” actions are (1) without jurisdiction; (2) challengeable at any time; and (3) without statutory authority. The appellate court agreed with the Fund and the retired teachers that the Fund did indeed have statutory authority to calculate pensions, even if it did so wrongfully. The Board did not

prevail on this issue.

A second issue proved more successful for the Board. The Board alleged that the trial court erred by refusing to permit an amendment to its complaint alleging that the Fund engaged in a “systematic decision” to improperly calculate retiree pensions and pay them at a higher-than-permitted monthly rate. The court — citing authority from previous court decisions — recognized that third-party governmental entities have standing to review cases when their finances may be affected by the actions of a pension board. “Systematic decisions” are more a challenge to the pension board’s rules, standards, and policies than an

individual pension benefit. The appellate court ruled the “systematic decision” alleged by the Board in this case merited remand to the circuit court.

In general, attacks on a pension board’s benefit calculations would remain subject to the time limitations of the Administrative Review Law with exceptions carved out by previous court decisions. More notably, the differentiation between standard pension board decisions and “systematic decisions” has been sharpened and clarified. The door has been widened for legal challenges against unauthorized pension calculations or other practices that affect municipal finances. ■

Prejudgment interest

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apply to the Illinois Pension Code. In reaching this conclusion, the court compared the Illinois Pension Code to the documents specifically mentioned in

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Section 2 of the Interest Act: bonds, bills, promissory notes, or other instruments of writing (including contracts, leases, and insurance policies). The court determined that these types of documents involve transactions of a business or commercial nature, and the provisions of the Illinois Pension Code have little in common with those documents.

As a result of the *Kouzoukas* holding, pension funds are no longer required to pay prejudgment interest when a denial of benefits is overturned on administrative review. ■

Attorney Notes

■ **OBKC&G, Ltd.** is pleased to announce that **W. Anthony Andrews** has joined the firm as a partner. Tony will primarily represent business owners, local governments, and EMS providers in tort liability actions and employment law matters from the firm’s Naperville office.

■ **Robert Britz** received accreditation from the United States Department of Veterans Affairs. The purpose of the VA’s accreditation program is to ensure that claimants for VA benefits receive qualified assistance in preparing and presenting their claims. Only attorneys accredited by the VA may represent claimants.

■ **Karl Ottosen** participated in the 25th Annual Chicago-Kent College of Law Illinois Public Sector Labor Relations Law Conference held on Friday, November 13, 2009 in Chicago. Karl was a member of the Police & Firefighter Forum workshop.

■ **Robert Britz** recently became a member of the National Academy of Elder Law Attorneys, Inc., a professional association of attorneys who are dedicated to improving the quality of legal services provided to senior citizens and people with special needs.

■ **Carolyn Welch Clifford** attended the National Association of Public Pension Attorneys’ 2009 Legal Education Conference, June 23-26 in Portland, Oregon. The conference included programs on the impact of the economy on defined benefit pension plans, concerns regarding municipal bankruptcies, the IRS survey of public pension plans, working after retirement in the public sector, and securities lending.

■ **Stephen DiNolfo’s** article, “Risky Business” appeared in the July 2009 issue of *Fire Chief Magazine*. Steve’s article provided an understanding of the laws affecting fire service training and examples of training issues that led to fire department liability. ■

Pre-deprivation hearing

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though it did hold a hearing after terminating his pension, the Board violated his right to due process by not holding the hearing first.

The court cited the United States Supreme Court's opinion in *Mathews v. Eldridge*, 424 U.S. 319 (1976) regarding an individual's right to a pre-deprivation hearing. The existence of such a right is determined by balancing "(1) the private interest affected by the official action, (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens that additional or substitute procedural safeguards would entail." Based on these administrative law principles, the court ruled Peacock was entitled to a hearing *before* termination of his disability benefits and, therefore, was entitled to payment of benefits he would have received if the Board had waited until after its hearing to terminate his disability benefits.

The *Peacock* case clarifies the rule that disability pensioners are entitled to a hearing before benefits are terminated. Terminating a disability pension prior to conducting a hearing could result, as it did in this case, in the pension board being responsible for back payment of pension benefits. ■

Municipalities begin adopting public question resolutions

by Patrick J. Jesse

Some DuPage County and northwest suburban municipalities have started adopting resolutions allowing a public question to be submitted to voters concerning actions by state legislators to attain long-term pension sustainability.

According to one such resolution, the Village of Barrington has experienced a 58% rise in actuarially required contributions to its firefighter pension fund from the 2007 tax levy to the 2009 tax levy and a 31.69% increase for the police pension fund during the same period. According to municipalities, several factors have contributed to the situation, including investment losses, legislatively mandated pension benefit increases, and cumulative wage increases. Many municipalities have publically stated they are experiencing a financial budget crisis affecting the level of public safety services provided and the long-term sustainability of the pension funds, due to the steadily increasing pension funding cost.

Article 28 of the Illinois Election Code enables a local government to submit a public question on an election ballot. In the case of a local government seeking to submit a public question, the resolution or ordinance of the governing board of a political subdivision which initiates the submission of a public

question must be adopted not less than 65 days before a regularly scheduled election to be eligible for submission on the ballot at such election. (10 ILCS 5/28-2(e)) A resolution or ordinance initiating the submission of a public question may specify a regular election at which the question is to be submitted, and must so specify if the statute authorizing the public question requires submission at a particular election.

As a result of the resolutions, the first public question will be placed on ballots for the February 2010 primary election. The Village of Barrington's voters will respond to the following public question on the February 2010 ballot:

Shall the Illinois General Assembly and the Governor take immediate steps to implement meaningful pension reform which will relieve the unsustainable burden on local taxpayers?

The outcome of the ballots on this question is purely advisory. Nevertheless, pension reform continues to be at the forefront of the financial crisis of the State and its municipalities. It remains to be seen what effect the results of the advisory questions will have on the Illinois General Assembly's actions this year. ■

Ottosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, *Legal Insights for Pension Boards*, is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

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