

LEGALINSIGHTS

FOR PENSION BOARDS

OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

Volume 17, No. 3 -- Fall 2010

Pension boards must be forthcoming in notices to beneficiaries

by Ericka J. Thomas

Several years ago, in *Bertucci v. Retirement Board*, 351 Ill.App.3d 368 (1st Dist. 2004), the First District Appellate Court determined that a widow of a Chicago firefighter was entitled to enhanced survivor benefits if she could demonstrate that her husband's duty injury was permanent and prevented him from ever returning to active duty. In response to the court's decision, the Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago sent letters to all widows whose husbands had died while on disability informing them that they may be eligible for enhanced survivor benefits. This was the first step to an entirely new storm of litigation for the Board.

The plaintiffs in the recent case of *Bell v. Retirement Board*, 398 Ill.App.3d 758 (1st Dist. 2010) were widows of Chicago firefighters whose husbands were permanently injured as a result of their duties and were receiving duty-disability benefits for their injuries at the time of their deaths. In each case, the Board had determined that the firefighters' injuries were permanent and prevented them from ever resuming their work as active firefighters. In each case, the Board determined that the firefighters had died from causes not related to the injuries they had sustained while on duty and awarded the widows a reduced non-duty death benefit after the firefighters died. When the Board notified the wid-

ows that they might be eligible for enhanced benefits pursuant to the *Bertucci* decision, each widow applied to the Board for enhanced benefits.

The Board determined that each of the widows' husbands' duty-related disabilities prevented them from ever resuming their service as firefighters and found that they were eligible for enhanced survivor's benefits. The widows received letters from the Board advising them that their applications were granted and they would be paid benefits retroactive to the date of the *Bertucci* determination, but they were not informed that the benefits would not be retroactive to the date of their husbands' deaths as *Bertucci* held. Between two to three years after the widows received their letters from the Board, they jointly filed a complaint for administrative review requesting that the enhanced benefits be retroactive to their husbands' deaths. The trial court determined that the widows were entitled to the retroactive benefits, plus pre- and post-judgment interest on the amount they were due.

The Board appealed the trial court's determination on several grounds. The Board initially argued that the trial court lacked jurisdiction over the administrative review action because it was not initiated within thirty-five (35) days from the date of the Board's action awarding the wid-

Appellate court weighs in on the effective date of pension benefit awards

by John H. Kelly

The Fourth District Appellate Court recently provided pension boards with additional guidance on determining the effective date of a disability pension award in *Philpott v. Board of Trustees of the City of Charleston Firefighters' Pension Fund*, 397 Ill.App.3d 369 (4th Dist. 2010). The particular facts of this case focused on John Philpott, a firefighter who first applied for a duty-related disability pension, withdrew it, and later submitted an application for a non-duty disability pension.

Philpott, a seven-year veteran of the Charleston Fire Department, suffered a spinal cord injury in April of 2004, while volunteering at a new firefighter training facility that the City of Charleston was constructing. On June 1, 2005, Philpott applied for a line-of-duty disability pension. On August 9, 2006, he filed a motion with the Charleston Firefighters' Pension Fund Board of Trustees to voluntarily withdraw his line-of-duty application. The Board granted Philpott's motion to withdraw his line-of-duty application on August 29, 2006. The Board issued a written order which (1) allowed the withdrawal of his application; (2) advised him of his appeal rights; and (3) notified him that this was the Board's final order. Philpott did not appeal the Board's decision.

Continued on page 4

Continued on page 2

What felony convictions require forfeiture of pension benefits?

by Donald L. Potts

Article 3 and Article 4 of the Illinois Pension Code both provide that no pension benefits can be paid to a person who is convicted of any felony “relating to or arising out of or in connection with” his or her service as a police officer or firefighter. (40 ILCS 5/3-147, 4-138) Determining when a felony conviction relates to, arises out of or is in connection with a person’s public employment has long been an issue. In two recent opinions, the Attorney General has expanded the nexus between a felony and public employment.

The most famous recent case involving felony forfeiture of pension benefits is former Governor George Ryan. In

that case, it was clear that his conviction was related to his public employment; the only issue was which of the public jobs he had held would be affected. In other words, the issue before the court was whether he would lose all, or only some, of his pension benefit. The trial court ruled that Ryan must forfeit his entire pension benefit, but the appellate court reversed the decision in 2009, holding that Ryan should only forfeit the pension benefit he earned as Secretary of State and Governor. Earlier this year, the Illinois Supreme Court reversed the appellate court decision and held that Ryan must forfeit his entire pension benefit. (*Ryan v. The Board of Trustees of the General Assembly Retirement*

System et al., 236 Ill.2d 315 (2010))

In another recent case, the Cook County Circuit Court ruled that a Chicago firefighter, who was convicted of six counts of arson, could keep his pension because he set the fires while off duty, without the use of any fire department equipment, and the arsons did not relate to his service as a firefighter. It is unclear whether this case will be appealed.

In two other recent matters, the Illinois Attorney General has issued opinions slightly expanding the nexus between a felony conviction and public employment.

Continued on page 3

Effective date of pension benefit awards

Continued from page 1

Nonetheless, on February 1, 2008, Philpott filed a new application for disability benefits, this time seeking a non-duty disability pension. On September 3, 2008, the Board granted his application for disability pension benefits, effective February 1, 2008, the date of his second application for benefits.

On September 22, 2008, Philpott filed for administrative review in circuit court, challenging the Board’s determination that his pension should be effective on February 1, 2008. Philpott argued the effective date of the pension should be June 1, 2005, the date he first applied for the line-of-duty benefits. The circuit court affirmed the Board’s decision to award the pension effective on the later date. Philpott then filed his appeal.

In its opinion, the court found that while the purpose of the Illinois Pension Code is to benefit members, the Board has a fiduciary duty to all members and beneficiaries of the Fund to accurately pay beneficiaries. The court also noted

that the Code does not contain guidance on determining the effective dates of pension awards. In affirming both the Board’s and the circuit court’s decisions, the appellate court focused on Philpott’s withdrawal of his first application.

The court carefully pointed out that the record of the proceedings before the Board was “unclear” as to why Philpott withdrew the line-of-duty application. The court noted that Philpott did not seek to amend his first application, nor did he file an application for pension benefits which sought, alternatively, either a line-of-duty pension or a non-duty pension. Rather, he withdrew his first application and did not appeal or contest the Board’s written decision granting his request to withdraw the line-of-duty application. The appellate court held that the Board correctly decided the effective date of his pension benefits based on the date of his second application. In reaching this conclusion, the court found that it was crucial that a pension board be aware of benefit claims pending before the board so they can “effectively

manage available funds.”

The *Philpott* case provides pension boards with three valuable points of guid-

The board should make clear rulings on all motions or other requests for action from a firefighter seeking benefits.

ance. First, when a board receives an application for benefits, it should determine whether an applicant is seeking line-of-duty, non-duty benefits, or both line-of-duty and non-duty benefits. Second, the board should make clear rulings on all motions or other requests for action from a firefighter seeking benefits. Third, the board should maintain copies of all applications and other related documents, as well as detailed written records of all its rulings including minutes of the disability hearings. ■

Forfeiture of pension benefits

Continued from page 2

Both cases involved employees of the Illinois Emergency Management Agency (“IEMA”) who were members of the State Employees’ Retirement System (“SERS”). SERS has a felony forfeiture provision similar to those in Articles 3 and 4 of the Illinois Pension Code.

Both employees were convicted of possession of child pornography. Additionally, one employee was convicted of distribution of child pornography and the other was convicted of official misconduct. All three offenses are felonies. In both cases, child pornography was found on the employee’s IEMA computer. With the exception of the official misconduct charge, neither employee’s conviction was related directly to the employee’s public duties. Rather, the only connection was that the employees

committed the crimes using IEMA property while at work. The Attorney General opined that, even without an official misconduct conviction, there was sufficient connection to the employees’ public duties to warrant forfeiture of their pension benefits. The Attorney General reasoned that:

As a State employee, Mr. Chambers was under a duty to use public property only for a lawful public purpose. In his position ... Chambers misappropriated the State’s computers and property and improperly used State work time to commit the depraved act for which he was convicted. Were it not for his employment with IEMA, Chambers would not have been in a position to use State property to

engage in this violation of the public trust. This is precisely the type of reprehensible misconduct which [the felony forfeiture provision] was intended to discourage.

When a member of a pension fund is convicted of a felony relating to, arising from or in connection with his or her service, the pension board must carefully examine the circumstances surrounding the conviction and the relevant section of the Illinois Pension Code to determine whether benefits must be terminated. It may not be immediately obvious whether a felony conviction warrants forfeiture of a person’s pension benefits. Based on the Attorney General’s opinions, even felony convictions that appear to have no connection to a person’s employment may be connected if the felony was committed on duty or with public resources. ■

Attorney Notes

■ **Carolyn Welch Clifford** and **Shawn P. Flaherty** are two of several instructors who will be teaching the Northwestern University’s School of Continuing Education new Public Pension Trustee Education Program to be held at Northwestern University’s Evanston campus on Monday, September 27th through Thursday, September 30th.

The Pension Trustee Education Program satisfies the State’s educational requirements for Article 3 and 4 police and firefighter pension fund trustees.

Carolyn will be teaching Module One, Fundamentals of Pension Fund Administration, and Module Four, Legal Issues in Pension Fund Administration; Shawn will be teaching Module Two, Pension Fund Trustee Ethics.

■ The Winter 2009-10 issue of *Answering the Call*, the Cook County Emergency Telephone System Board’s quarterly newsletter published an article detailing **John Kelly**’s efforts to rewrite Illinois’ 9-1-1 laws. The article focused on John’s involvement as a member of a legislative sub-committee that is addressing both changing communications technology and the need for adequate funding to restructure current 911 systems. The article also highlighted John’s accomplishments during his 37 years of public safety service.

■ **Carolyn Welch Clifford** was a featured speaker at the National Association of Public Pension Attorneys’ (NAPPA) 2010 Legal Education Conference, June 22-25 in Asheville, North Carolina.

■ Several **OBKC&G, Ltd.** attorneys presented at the Northern Illinois Alliance of Fire Protection Districts Annual Conference held February 4 - 7, 2010, in Oak Brook, Illinois. **Karl Ottosen** spoke on “Collective Bargaining” and “Economics and Labor.” Also, **Karl** was one of the moderators for the open forum, “Dealing with Today’s Economic Challenges.” **Steve DiNolfo** addressed “Understanding the Disciplinary Process and Commissioner’s Role.” **Tom Gilbert & David Zafiratos** spoke on “Legal Updates for Fire Commissioners,” and **Shawn Flaherty** discussed “Ethical and Fiduciary Challenges for Pension Fund Trustees and Advisors.” **Carolyn Clifford** addressed “Effective Oral Interview Processes for New Hires and Promotions,” “Demystifying the Actuarial Process,” and “Current Issues for Illinois Firefighter Pension Funds.” ■

Pension boards must be forthcoming

Continued from page 1

ows the enhanced survivor's benefits. In reviewing the Board's claim, the court considered whether the notice that the Board had given the widows fairly and adequately informed them of its decision. The notice provided to the widows stated that the enhanced benefits would be effective as of the date of the *Bertucci* decision. This notice was defective, however, because both the *Bertucci* decision and Section 6-140 of the Illinois Pension Code provided for the benefits as of the date of the firefighters' deaths.

The court also noted that the notice failed to inform the widows that by granting them the enhanced benefits as of the date of the *Bertucci* decision, it was denying them a substantial amount of retroactive payments to the date of their husbands' deaths. Additionally, the notice was misleading in that it informed the widows of their right to appeal "although the decision was favorable" to them. Finally, the court found that the notice of the hearing to consider the enhanced benefits was defective because it stated that the widows were not required to attend the meeting or hire counsel to represent them. Based upon all of these deficiencies, the First District concluded that the Board's action did not trigger the thirty-five (35) day limitation period under the Administrative Review Act.

The Board also claimed that its action of awarding the enhanced benefits

prospectively from the date of the *Bertucci* decision was correct. The appellate court specifically rejected this argument and determined that the enhanced benefits should have been awarded as of the date of the firefighters' deaths. Although the appellate court for the most part upheld the trial court's ruling, it reversed its award of prejudgment interest based upon the Illinois Supreme Court's decision in *Kouzoukas v. Retirement Board*, 234 Ill.2d 446 (2009). The appellate court found that the widows had not alleged purposeful wrongdoing by the Board such that equitable grounds would support the award of prejudgment interest and the pension plan was not within the scope of Section 2-1303 of the Code of Civil Procedure (735 ILCS 5/2-1303).

The appellate court did uphold the trial court's award of post-judgment interest in the amount of 9% because it determined that the pension fund was not a "governmental entity" under Section 2-1303. It has been held that a "governmental entity" under Section 2-1303 is an entity that performs a governmental function authorized by constitution, statute, or other law and is carried out for the benefit of the general public. Because the Board's primary function is to administer the pension fund for the benefit of firefighters, it does not fall into this category.

The appellate court's analysis in the

Bell case is instructive to pension funds in several areas, particularly on the proper form of notice to pension applicants. It is important that a pension fund's notice to an applicant of an upcoming meeting that might affect his or her benefits be as straightforward as possible. The notice should state the date, time and location of the meeting and inform the applicant that his or her benefits will be considered at the meeting. The pension fund should not advise the applicant in the notice about whether they should appear for the meeting or hire counsel, simply that they have those rights.

Further, the pension board should issue a straightforward, written decision. The decision should state the benefits that were specifically awarded, the benefits that were specifically denied, under what statutory authority the board acted, and inform the applicant of his or her right to appeal within thirty-five (35) days of the date of the decision. The pension board should avoid inserting comments in its decision about whether the outcome of the proceeding was "favorable" or "unfavorable" to the applicant. Such comments could mislead and lull the applicant into failing to pursue his or her rights to appeal. It is always prudent to consult with an attorney regarding the proper conduct of pension proceedings and the proper form of written notifications to pension applicants. ■

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:

OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

1804 North Naper Boulevard, Suite 350

Naperville, Illinois 60563

(630) 682-0085 www.obkcg.com FAX (630) 682-0788

Carolyn Welch Clifford, Editor cclifford@obkcg.com

Copyright 2010 by OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD. All rights reserved.
Pursuant to Rules 7.2-7.4 of the Illinois Rules of Professional Conduct, this publication may constitute advertising material.

