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**Illinois Supreme Court reverses
appellate court's decision to declare
Section 3-115 unconstitutional**

by Joseph Miller, III

A recent Illinois Supreme Court decision removes the unconstitutional cloud over the three physician certification requirement under Article 3 of the Illinois Pension Code. In *Marconi v. Chicago Heights Police Pension Board*, ___ Ill.2d ___, 2006 WL 2975534 (2006), the Illinois Supreme Court clarified the standards a pension fund board should follow when conducting disability pension application hearings.

Marconi, a Chicago Heights police officer, was referred to the department's psychiatrist due to concerns regarding his mental well-being. Specifically, fellow officers overheard Marconi discussing thoughts of suicide. In addition, the police chief was concerned regarding Marconi's hostility towards others. After consulting the department's psychiatrist, the police department placed Marconi on a paid leave of absence. The department's psychiatrist, Dr. Carl Wahlstrom, noting that Marconi was unable to exercise reasonable judgment in regards to the police chief, diagnosed Marconi with major depression and found him unfit for duty.

In April 1997, Marconi filed an application with the police pension fund for a duty-related disability pension. Marconi's application noted Dr. Wahlstrom's diagnosis and Marconi's involvement in multiple shootings that contributed to his disability. In accordance with Section 3-115 of the Illinois Pension Code (40 ILCS 5/3-115), the Board scheduled independent medical evaluations of Marconi with three psychiatrists and one psychologist. Three of the evaluators found that Marconi was unfit for duty and disabled, while one evaluator found that Marconi was able to return to duty.

In September 1999, the Board scheduled a hearing on Marconi's disability ap-

Continued on page 2

**Court provides guidance on adjudicating mental
disability pension claims involving firefighters**

by Carolyn Welch Clifford

Until recently, firefighter pension fund boards had little guidance in evaluating a mental disability application of a firefighter. While there has been a plethora of case law involving police officers with mental disability claims, the only reported case in Illinois involving a firefighter was *Graves v. Pontiac Firefighters' Pension Board*, 281 Ill.App.3d 508 (4th Dist. 1996). However, in the recent decision of *Hammond v. The Firefighters Pension Fund of the City of Naperville*, ___ Ill.App.3d ___, 859 N.E.2d 1094 (2nd Dist. 2006), the Second District Court has now provided some guidance for firefighter pension fund boards in evaluating whether a mental disability is duty-related. In *Hammond*, the court upheld the Board's decision to award a firefighter a non-duty disability pension -- and deny a line-of-duty disability pension -- due to his psychological condition.

In early 2001, City of Naperville firefighter John Hammond experienced episodes of depression and anxiety, including lightheadedness, dry mouth, shortness of breath, chest discomfort, panic symptoms, and general loss of composure, all of which significantly affected his work performance. In September 2001, Hammond lost his composure following an incident with another firefighter, and then broke down in the presence of superior officers who approached him to discuss the incident. In early 2002, Hammond was reprimanded for an incident during his annual physical, which a nurse perceived as sexual harassment. Shortly thereafter, he reported experiencing symptoms of anxiety while delivering a baby on the job, and he expressed doubts regarding his ability to continue to perform his job.

During the period between January 2001 and June 2003, Hammond was referred to a psychiatrist and began to receive counseling from a licensed professional. He was placed on administrative leave, referred to a psychologist, and assigned to alternate duty. He then returned to full-time duty, but was soon reassigned to administrative duties and referred to another psychiatrist. On June 25, 2003, he applied to the Board for line-of-duty disability benefits.

Shortly after submitting his disability application, Hammond received two separate psychological evaluations from physicians who concluded he suffered from "very significant" depression, anxiety, and panic attacks. Two of the physicians linked Hammond's symptoms "very directly to the cumulative trauma, demand, and pressure of his job as a fireman/paramedic." Hammond submitted these evaluations to support his application. Hammond was then evaluated by an independent psychologist appointed by the pension board, as well as by three Board-appointed independent psychiatrists, two of whom

Continued on page 2

Illinois Supreme Court

Continued from page 1

plication. At that time, the Board received the IME reports and scheduled another hearing date; however, the Board did not reconvene until June of 2001. At the June 2001 hearing, the Board heard Marconi's testimony and admitted the deposition testimony of Dr. Wahlstrom. The next hearing on Marconi's disability application occurred in late August of 2002. In October of 2002, the Board issued its decision denying Marconi's request for a duty-related disability pension. In its decision, the Board noted that Marconi was no longer under psychiatric care and that he testified he now felt "normal." The Board relied heavily on the report that found Marconi was not disabled and was able to return to duty.

Marconi filed a complaint for administrative review. Specifically, Marconi alleged that his due process rights had been violated because of the excessive delays in the hearing dates and that the Board's decision that he was not disabled was clearly erroneous. After the circuit court upheld the Board's decision, Marconi appealed to the appellate court. The appellate court reversed the circuit court's decision, finding that Marconi was entitled to a disability pension because at the time of his removal from employment everyone agreed he was disabled. In addition, the appellate court determined that Section 3-115 was unconstitutional because it failed to provide an applicant any right to question a pension board's selection of evaluating physicians.

The Illinois Supreme Court reviewed the case upon the Board's appeal of the appellate decision. In overturning the appellate court, the Illinois Supreme Court noted that there was an actual factual dispute as to Marconi's disabled status. The court noted that one of the evaluating physicians did not find Marconi disabled. Further, the court did not find that the Board's decision was against the manifest weight of the evidence considering Marconi's own testimony that he currently felt normal. Finally, the court found no due process violation because the Board had legitimate reasons for delaying Marconi's hearing.

Although the court determined that the delayed hearings did not violate Marconi's due process rights, it did not condone such delays. Further, the court noted that if the trustees of a pension board act with care, skill, prudence, and diligence in reviewing pension applications, the board will fulfill its fiduciary duty to all of the participants in the pension fund. ■

Mental disability pension claims

Continued from page 1

concluded that he was disabled. However, only two of the psychiatrists found Hammond's disability to be duty-related, while the psychologist and the third psychiatrist determined it was non-duty related.

At the end of the two-day hearing in December 2004, the Board voted to award Hammond a non-duty disability pension and deny his request for a line-of-duty disability pension. The Board directed its counsel to draft an order reflecting its decision. However, before the order was drafted, the Board mailed a memorandum to Hammond, apprising him of the amount of the non-duty disability pension benefit. In response, Hammond filed a complaint for administrative review on January 11, 2005. The Board's motion to dismiss the complaint on the grounds that it was premature was unsuccessful. Ultimately, on April 27, 2005, the Board adopted a detailed written Findings and Decision which was forwarded to Hammond. Upon receipt of the written decision, Hammond filed a second complaint for administrative review. Since two complaints for administrative review had been filed based on the same Board's decision, the trial court consolidated the two proceedings, and granted the Board's motion to dismiss the second complaint. The trial court then affirmed the Board's decision to grant Hammond a non-duty disability pension. Subsequently, Hammond appealed both the trial court's dismissal of his first complaint for administrative review and its decision to uphold the Board's ruling.

The court first addressed the issue regarding jurisdiction of the trial court. The court considered whether the initial memorandum sent to Hammond informing him of the pension benefit amount prior to issuance of the formal Findings and Decision was sufficient to trigger the thirty-five day limitation period to seek administrative review under the Administrative Review Law (735 ILCS 5/3-103). The court found that the memo initially sent to Hammond was sufficiently clear to inform him that it was not intended to serve as a "full expression" of the Board's decision and that a formal, complete written decision was to follow. Consequently, the court held that the written Findings issued on April 27, 2005, triggered the thirty-five day limitation period, not the prior memorandum sent to Hammond that simply apprised him of the amount of the pension benefits.

In reviewing the Board's decision to deny a line-of-duty disability pension, the court examined the evidence presented at the original hearing, and found that the Board's decision to award a non-duty disability pension and deny a line-of-duty disability pension was not clearly erroneous. The court reviewed the decision in *Graves* which had held that a firefighters' "general job dissatisfaction or job stress arising from the inability to handle general duties does not give rise to a duty-related disability pension." In *Graves*, the court indicated that even where general aspects of a firefighter's duties cause or contribute to a psychological disability, "stress or depression resulting from general employment functions inherent in the occupation and common to all firefighters [is] not the equivalent of the specific acts of duty contemplated by the statute."

However, the problem with *Graves* is that it relied on case law involving police officers' claims for mental disability pensions

Continued on page 3

The Federal Pension Protection Act of 2006: Applicability to police and firefighter pension funds

by Donald L. Potts

On August 17, 2006, President Bush signed into law the Pension Protection Act of 2006 (the Act), effective January 1, 2007. Although the Act is primarily aimed at private ERISA covered pension funds, two sections of the Act apply specifically to public safety employee pensions. Section 828 exempts qualified public safety employees from a ten percent (10%) tax on early distributions made to employees who begin receiving their pensions after age 50. Section 845 permits eligible retired public safety officers to exclude from taxable income up to \$3,000 per year in pension distributions that are used to purchase health insurance or long-term care insurance.

The Internal Revenue Code provides for an additional ten percent (10%) tax on early distributions (prior to age 59½) from qualified retirement plans unless an exemption applies. One exemption applies to any employee who separates from service after they reach age 55. The Act lowers the age of exemption to 50 for qualified public safety employees. Further, the exemption is retroactive to any distributions made after August 17, 2006. The term "qualified public safety employee" means an employee of a state or political subdivision of a state who provides police protection, firefighting services or emergency medical services.

Section 845 initially was introduced in Congress as the Healthcare Enhancement for Local Public Safety (HELPS) Retirees Act and was later incorporated into the Pension Protection Act of 2006. Section 845 permits an eligible retired public safety officer to exclude from his or her gross income up to \$3,000 per year that is used to pay qualified health insurance premiums for an accident or health insurance plan or long-term care insurance. The portion of pension benefits used to pay qualified health insurance premiums is not taxed.

An eligible retired safety officer is defined as an individual who has separated from service, either due to disability or attainment of normal retirement age, as a public safety officer with an employer who maintains an eligible government plan. Illinois police and firefighter pension funds, as well as 457 and 401(a) plans, are eligible government plans. If an employee receives benefits from more than one plan, he or she is limited to \$3,000 per year in total, not per plan.

It is only necessary that the employee be a public safety officer at the time of retirement. If a retiree has transferred creditable service from another Article of the Pension Code, those benefits can be used under the Act to pay insurance premiums. Conversely, if an employee earns creditable service as a firefighter or police officer, and later changes jobs and retires from a position that does not qualify as a public safety officer, the Act will not apply.

The retiree must elect to pay the insurance premiums directly from the pension. A retiree cannot claim the favorable tax treatment if he or she pays insurance premiums from money received from a pension fund. Also, insurance premiums must be paid to an insurance company regulated by the state. Self-insured plans do not qualify for favored tax treatment. Unfortunately, many municipal

Continued on page 4

Mental disability pension claims

Continued from page 2

which apply a different definition of "act of duty" for purposes of analyzing the duty-relatedness of a disability claim. In *Jensen v. East Dundee Fire Protection District Firefighters' Pension Fund Board of Trustees*, 362 Ill.App.3d 197 (2nd Dist. 2005), the Second District made it clear that "act of duty" for a firefighter is different than that of a police officer. Using the definition found in Section 6-110 of the Illinois Pension Code, "act of duty" means "[a]ny act imposed on an active fireman by the ordinances of a city, or by the rules or regulations of its fire department, or any act performed by an active fireman while on duty, having for its direct purpose the saving of the life or property of another person." (40 ILCS 5/6-110)

The court pointed out that there was conflicting evidence as to the cause of Hammond's psychological condition. The court opined that even if it were possible for Hammond to receive a line-of-duty disability pension for a disability caused by general occupational pressures (contrary to *Graves*), the Board's decision was still not clearly erroneous in light of the evidence. While the court noted that Hammond may have experienced severe job related stress, it also pointed to evidence that showed his job related stress may have triggered or exacerbated pre-existing symptoms or may have simply stemmed from his personality. The court explained that:

"Although plaintiff may have experienced severe stress on the job, the Board apparently was persuaded by evidence that plaintiff's duties merely *triggered symptoms* of one or more disorders rooted in nonoccupational sources. There was evidence that plaintiff's inability to function as a firefighter resulted from features of his personality, including poor interpersonal skills and excessive sensitivity to criticism or disapproval from authority figures, and that other personal problems – marital difficulties and the death of plaintiff's parents – contributed to plaintiff's occupational problems. In other words, although plaintiff may have suffered acute stress in certain occupational situations, the underlying causes were external to, and independent of, his duties as a firefighter/paramedic. As such, the Board's decision to deny plaintiff a line-of-duty disability pension was not clearly erroneous."

Continued on page 4

The Federal Pension Protection Act

Continued from page 3

governments are self-insured for health insurance which then excludes many retired safety officers from taking advantage of the benefit.

The Act does not require a pension fund to accept a retiree's election to pay insurance premiums directly from pension benefits. The Act only addresses the tax implications of such an election. If a pension fund decides to provide this benefit, it should adopt rules specifying how elections are to be processed. ■

Mental disability pension claims

Continued from page 3

The decision is significant from the standpoint that now firefighter pension funds have some guidance on how to properly apply the "act of duty" standard applicable to firefighters in evaluating mental disability claims. The decision provides some framework in sorting through the evidence in determining at what point the inherent stress of firefighting will trigger a line-of-duty disability pension. ■

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GASB 45: Financial reporting of post-employment benefits

by Donald L. Potts

The Governmental Accounting Standards Board (GASB) sets standards for state and local governmental employers' accounting and financial reporting. In 1994, GASB established accounting and reporting standards for the present cost of future pension benefits. However, because pension benefits are not the only post-employment benefit provided by governmental employers, in 2004, GASB issued Statement 45 (GASB 45) which applies rules similar to those for pension benefits to other post-employment benefits, (OPEB), such as retiree life, health, and dental insurance. It is important to note that GASB 45 does not mandate funding of OPEB and is only concerned with accounting and reporting standards.

GASB considers OPEB to be part of the compensation package that an employee receives each year, even though the benefits are not paid until retirement. Therefore, the present cost of these future benefits must be accounted for to provide an accurate picture of a governmental employer's financial position. Most governmental employers follow a pay-as-you-go approach to funding OPEB, paying an amount each year equal to the benefits paid out in that year. However, the governmental employer is also incurring future liabilities that generally are not accounted for or reported. GASB 45 requires governmental employers to account for and report OPEB obligations and commitments based on an actuarial report, similar to the method for reporting pension benefits.

In addition, GASB 45 requires governments to account for and report the assets and liabilities of their OPEB plans, as well as the annual amount required to provide sufficient resources to fund both the normal cost of the plan and any unfunded liabilities of the plan over a period of time. GASB 45 also mandates that governments provide information about their OPEB plans including: (1) a plan description; (2) a funding policy; (3) the number and type of employees covered and benefits provided; (4) information concerning contributions actually made; (5) the funded status of the plan and the actuarial methods and assumptions used; and (6) a schedule of funding progress and employer contributions over the last three actuarial evaluations.

Actuarial reports will be required every two years for employers with more than two hundred OPEB plan members, and every three years for employers with fewer than two hundred OPEB plan members. Further, employers with fewer than one hundred plan members will be able to estimate their OPEB liabilities and required contributions using simplified methods and assumptions.

GASB 45 is being phased in over several years based on total annual revenues for the first fiscal year ended after June 15, 1999. Governmental employers with total annual revenues of \$100 million or more should begin implementing the new standards for periods after December 15, 2006. Governmental employers with total annual revenues of \$10 million to \$100 million should begin implementing the new standards for periods after December 15, 2007, and governmental employers with total annual revenues of less than \$10 million will begin after December 15, 2008. ■

