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**Second District Appellate Court  
broadens definition of "line of duty"  
for police disability pensions**

by Ericka J. Thomas

The Second District Appellate Court recently rendered another decision which arguably broadened the definition of "line of duty" for police disability pensions in *Harroun v. Addison Police Pension Board*, 372 Ill.App.3d 260 (2<sup>nd</sup> Dist. 2007). In *Harroun*, the plaintiff was employed as a police officer for the Village of Addison. While off duty, at his home in Bloomingdale, the plaintiff observed a person attempting to burglarize his neighbor's home. The plaintiff called the Bloomingdale police department to report the break in and attempted to apprehend the burglar. While struggling with the burglar, the plaintiff was seriously injured and, ultimately, became disabled from performing his duties as a police officer.

The Addison Police Pension Board concluded that the plaintiff was entitled to a disability pension as a result of his injuries. However, the Board held that the officer was only entitled to a non-duty disability pension because he had sustained the injuries off-duty and outside the corporate limits of the Village of Addison. On administrative review, the trial court reversed the Board's ruling and awarded the officer a line of duty pension. The Board appealed to the Second District Appellate Court. The Second District affirmed the trial court's ruling.

In its decision, the Second District reaffirmed that the definition of "act of duty" found in Article 5 of the Illinois Pension Code (Chicago police) is applicable to Article 3 pension issues (downstate police) as well. Section 5-113 of the Code defines "act of duty" as "any act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a

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**Fire and police commissions must give closer scrutiny  
to employee misconduct related to psychiatric conditions**

by Ericka J. Thomas

Recently, the Second District Appellate Court held that it was unreasonable for a board of fire and police commissioners to terminate a firefighter for cause without making a specific finding as to whether the firefighter's mental problems and illnesses were substantially related to his incident of misconduct. In *Hermesdorf v. Wu*, 372 Ill.App.3d 842 (2<sup>nd</sup> Dist. 2007), the Second District reaffirmed similar holdings made by the Illinois Supreme Court in *Walsh v. Board of Fire & Police Commissions*, 96 Ill.2d 101 (1983) and the Second District Appellate Court in *Lynch v. City of Waukegan*, 363 Ill.App.3d 1078 (2<sup>nd</sup> Dist. 2006).

Before examining the holding in *Hermesdorf*, it is instructive to review the holdings in both *Walsh* and *Lynch*. In *Walsh*, the Illinois Supreme Court remanded the case to the board of fire and police commissioners for further consideration of whether a police officer's misconduct was "substantially related" to the psychiatric problems that led to his prior medical suspension. Disciplinary charges were filed against the officer in *Walsh* as the result of an incident wherein the suicidal officer unintentionally injured a fellow officer during a suicide attempt. The incident occurred while the officer was on a medical disability suspension. Only vague psychiatric evidence about the officer's condition at the time of the incident was submitted during the hearing. The court remanded the case for further evidence on the officer's psychiatric condition because of concern that the police officer's disability pension rights could be jeopardized. The court held that if the board found the plaintiff's misconduct was "substantially related" to the psychiatric problems that led to his prior medical suspension, the proper sanction would be other than discharge for "cause."

In the more recent *Lynch* decision from the Second District, the court remanded the case to the civil service commission for further proceedings to determine whether a sanction less than discharge would be appropriate for a firefighter with psychiatric concerns. In *Lynch*, a firefighter was discharged because he was unable to perform the duties assigned to him, took too much sick leave, and secured outside employment without permission. Subsequent to his discharge, the pension board granted the firefighter a duty-related disability pension because he had a cognitive disorder that impaired his ability to process information and make decisions, especially in complex or stressful situations. The Second District determined that it was "bound by *Walsh*" and held

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## Definition of “line of duty”

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policeman by the statutes of this State or by the ordinances of police regulations of the city in which this Article is in effect or by a special assignment; or any act of heroism performed in the city having for its direct purpose the saving of the life or property of a person other than the policeman.” (40 ILCS 5/5-113)

In considering the applicability of Section 5-113 to the facts of the case, the Second District also considered the language of Section 3-114.1(a) of the Code (40 ILCS 5/3-114.1(a)), which addresses downstate police line of duty disability pensions. The Second District disagreed with the Board’s interpretation of Section 3-114.1(a) that the police officer had to be injured “on duty” to receive a line of duty disability pension. The Second District noted that Section 3-114.1(a) did not require a police officer to be “on duty” in order to perform an “act of duty.”

The Second District concluded that the officer was performing an “act of duty” as defined by Section 5-113 when he attempted to apprehend the burglar. The court stated that in attempting to subdue a suspected criminal, the officer was clearly engaged in an act involving special risk not encountered by ordinary citizens. The court further noted that the officer is statutorily obligated under the Illinois Code of Criminal Procedure to apprehend an offender who commits a crime in his presence, regardless of whether he is on duty. (725 ILCS 5/107-16) In addition, the court stated that Illinois case law and statutes allow a police officer to make an arrest outside of his jurisdiction as long as the arrest is made in a municipality within the same county as the officer’s jurisdiction. ■

## Employee misconduct

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that *Walsh* precluded the commission from discharging the plaintiff for cause based on misconduct that was substantially related to the psychiatric problems that formed the basis for his pension. The court held that discharge would only be appropriate if there were “adequate grounds for plaintiff’s discharge independent of the cognitive disorder upon which the pension was based.”

The facts of the *Hermesdorf* decision are a hybrid of the *Walsh* and *Lynch* cases. Hermesdorf, a firefighter/paramedic for the City of Naperville Fire Department for seventeen years, responded to a call to provide treatment to a female being held in custody at the Naperville Police Department. Hermesdorf reportedly pulled the woman up by her hair, verbally abused her, twisted her arm behind her back, and pushed her down onto the gurney by either her chest or throat when she tried to sit upright. Upon arrival at the hospital, the woman refused treatment, was returned to the police station, and was subsequently released from police custody. She later returned to the police station to file a complaint against Hermesdorf. Immediately following this incident, Hermesdorf admitted himself into a psychiatric unit, and was diagnosed with depression and bipolar disorder. Hermesdorf’s physician indicated that he was to continue taking his medications and was to remain off work “until further notice.”

Charges were brought against Hermesdorf, seeking his discharge before the board of fire and police commissioners. Hermesdorf also applied for disability benefits from the Naperville Firefighters’ Pension Fund based on a mental impairment. In mitigation at the discharge hearing, Hermesdorf introduced documentation concerning his psychiatric condition and treatment, but the commission discharged him. Hermesdorf filed an administrative review action seeking to overturn the commission’s decision to discharge him. While that action was pending, the Naperville Firefighters’ Pension Board granted Hermesdorf a non-duty disability pension based upon his psychiatric problems.

After the trial court upheld the commission’s decision to discharge Hermesdorf for cause, Hermesdorf filed an appeal with the Second District Court asserting that he could not be discharged for his misconduct based on *Lynch* and *Walsh*. On appeal, the Second District concluded that the evidence supported the Board’s finding that Hermesdorf was guilty of the underlying charges. However, the court agreed with Hermesdorf’s position and concluded that it was unreasonable for the commission to have discharged Hermesdorf for cause without having a specific finding as to whether his illness was substantially related to the misconduct. The court reversed the trial court’s decision and remanded the case to the commission for further proceedings.

The *Lynch* and *Hermesdorf* decisions provide more concrete instruction to administrative agencies that are assigned the difficult task of disciplining employees where medical or psychiatric conditions may be involved. Such agencies must not only consider misconduct committed by the employee and the effect the misconduct has on the employer, but also, if raised, make a determination about whether the misconduct can be linked to a medical or psychiatric condition. If a substantial link can be established, *Lynch*, *Walsh*, and *Hermesdorf* dictate that the employee cannot be discharged for that misconduct. ■

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## Ability of police and firefighter pension funds to recover overpayment of benefits

by Donald L. Potts

In spite of carefully implemented protocols and procedures, occasionally a pension fund discovers that it has overpaid one or more beneficiaries. The question then arises: Can the fund recover the money, either through direct repayment by the beneficiary or by reducing future payments to the beneficiary, until the difference is offset?

Initially, the answer depends upon the nature of the error resulting in the overpayment. For example, if the error occurred during the pension board's determination of whether to grant a pension, the pension fund must follow the requirements of the Administrative Review Law (735 ILCS 5/3-101 *et seq.*), which include a very restrictive limitations period. However, if the overpayment is the result of a miscalculation by administrative staff, the pension board generally should be able to recover the excess amount.

In *Rosler v. Morton Grove Police Pension Fund*, 178 Ill.App.3d 769 (1<sup>st</sup> Dist. 1989), the police pension fund board granted Rosler a retirement pension based on twenty years of creditable service. Over one year later, the pension fund discovered that Rosler's creditable service had been miscalculated, and he did not have twenty years of creditable service. The pension fund board attempted to hold a new hearing to reconsider his pension. Rosler sued to prevent the rehearing.

Decisions by downstate police and fire pension funds can only be reviewed in accordance with the requirements of the Administrative Review Law. Section 3-103 of the Administrative Review Law provides that any action to review a final administrative decision must be made within 35 days from the date the decision is served on the party affected. (735 ILCS 5/3-103) The court in *Rosler* held that the pension fund board could only seek to correct Rosler's pension decision within that 35-day window. Because it did not, it was barred from reconsidering Rosler's pension.

The issue of recovering overpayments due to administrative error is addressed by statute for Illinois police pension funds. Section 3-144.2 of the Illinois Pension Code specifically provides that "[t]he amount of any overpayment, due to fraud, misrepresentation or error, of any pension or benefit granted under this Article [3] may be deducted from future payments to the recipient of such pension or benefit." (40 ILCS 5/3-144.2) There is unfortunately no corresponding provision in Article 4 of the Illinois Pension Code for firefighter pension funds.

A recent federal case from Tennessee -- *Johnson v. Retirement Program Plan*, \_\_\_ F.Supp.2d \_\_\_, 2007 WL 649280 (E.D. Tenn. 2007) -- may offer some insight on these issues, however. In *Johnson*, the court held that a private pension plan legally could recoup overpayments of pension benefits paid to a retired employee. The court made this determination based on the application of the federal Employee Retirement Income Securities Act (ERISA). Although ERISA does not apply to public pension funds in Illinois, the court's holding provides guidance for Illinois police and

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## Attorney Notes

- **OBKC&G, Ltd.** attorneys spoke at the Illinois Association of Fire Protection Districts Annual Conference held June 21-24, 2007, at the Prairie Capital Convention Center in Springfield, Illinois. **Karl Ottosen, Thomas Gilbert, Stephen DiNolfo, and Shawn Flaherty** took part in a "Legal Open Forum – Panel of Attorneys." In addition, **Shawn Flaherty** and **Joseph Miller** conducted a "Legal Update." **Karl Ottosen** addressed "Employment Issues in the Career Department," and **Stephen DiNolfo** discussed "Current Liability Do's and Don'ts." **Thomas Gilbert** and **Donald Potts** spoke on "Establishing an Article 4 Pension and Update on Pension Issues."
- **Shawn Flaherty** and Alton attorney, Jim Sinclair, have co-authored the 2007 edition of the "Handbook for Trustees of Illinois Fire Protection Districts" published by the Illinois Association of Fire Protection Districts. This IAFPD Handbook is a practical summary of the laws applicable to Illinois fire protection districts. Copies of the handbook are available at the IAFPD website at [www.iafpd.org](http://www.iafpd.org).
- **Shawn Flaherty** and **Carolyn Welch Clifford** were featured speakers at the Illinois Government Financial Officers Association's Training Program, *Basics of Public Pension Management*, on Thursday, April 26, 2007, at Northern Illinois University's Naperville Campus. Shawn discussed "Permissible Investments and Investment Law," and Carolyn addressed "Disability Issues."
- **Shawn Flaherty** was a featured speaker at Northern Illinois University Law Review's 16<sup>th</sup> Annual Law Review Symposium, *Emerging Issues in Election Law*, on Monday, March 26, 2007 in Altgeld Hall in DeKalb, Illinois. Shawn participated in the morning presentation and presented his law review paper entitled "Dollars, CPI, and Voter Empowerment: Public Act 94-976 and its Impact on Local Government Tax Referenda."
- **John Kelly** was the closing session presenter on "Liability and Privacy Issues in the 9-1-1 Center" at the National Emergency Number Association Annual Conference held in Charlotte, North Carolina on June 14th.

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## Attorney Notes

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- **Carolyn Welch Clifford** attended the National Association of Public Pension Attorneys' 2007 Legal Education Conference, June 26-29 in Vail, Colorado. The conference workshops included programs on Sudan Divestment, a Litigation Update, and the Pension Protection Act and Determination Letter Process.
- **OBKC&G, Ltd.** welcomes three law clerks to our Wheaton and Joliet offices. **Michelle Grotto** is a third year law student at Northern Illinois University College of Law. Michelle, a DePaul University graduate with an undergraduate degree in Music Performance, works at the Wheaton office. **Graham Liccardi** is a second year law student at The John Marshall Law School. Graham received his bachelor's and master's degrees from Miami University in Ohio. Graham works at the firm's Wheaton office. **Victoria Johnson**, a graduate of Quincy University, has completed her second year of law school at Northern Illinois University College of Law. Vicki divides her time between the Elburn and Joliet offices. ■

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## Overpayment of benefits

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firefighter pension funds because the general principles of ERISA have been referenced by the courts in analyzing fiduciary issues for fire and police pension funds in Illinois. (*Board of Trustees of Barrington Police Pension Fund v. Department of Insurance*, 211 Ill.App.3d 698 (1<sup>st</sup> Dist. 1991))

The *Johnson* court looked to the responsibility of plan administrators as fiduciaries. Under ERISA, a person is a fiduciary with respect to a plan if he or she "exercises any discretionary authority or discretionary control respecting management of [the] plan or exercises any authority or control respecting management or disposition of its assets" or "has any discretionary authority or discretionary responsibility in the administration of [the] plan." (29 U.S.C. §1002(21)(A)) The Illinois Pension Code contains a virtually identical definition of fiduciary. (40 ILCS 5/1-101.2) Further, a fiduciary under ERISA is required to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." (29 U.S.C. §1104(a)(1)) Again, the Illinois Pension Code imposes the same requirement on fiduciaries of pension funds. (40 ILCS 5/1-109)

In *Johnson*, the retirement plan granted broad authority to the plan administrators to oversee the retirement fund. Similarly, boards of trustees of firefighter pension funds are granted broad authority to control and manage the pension fund. (40 ILCS 5/4-123) The court considered this broad authority and the duties of fiduciaries and concluded that, to protect the plan, the administrators must have the ability to recover overpayments made to beneficiaries.

This authority is not without limitations. The members receiving the overpayments are also part of the fund and, therefore, the plan administrators have a duty to them, as well. To achieve this balance between the fund and the member, the pension fund must consider the following factors:

- (1) the beneficiary's disposition of the money that was overpaid;
- (2) the amount of the overpayments;
- (3) the nature of the error made by the pension fund;
- (4) the amount of time that has passed since the error was made; and
- (5) the beneficiary's total income and the effect recoupment would have on that income.

For example, if a retired firefighter had been receiving overpayments for a long period of time as a result of the pension fund's error, and would be seriously affected financially by recoupment, the fund may not be able to recover the overpayments.

Of course, the best practice is to ensure that benefit payments are calculated accurately to avoid overpayments in the first place. However, if an error occurs, the pension fund may have the authority to recoup overpayments. A pension fund facing this dilemma should seek legal counsel prior to pursuing recoupment of overpayments to insure that the beneficiary receives proper notice and due process. ■

