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Legal Insights

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for Pension Boards

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**Recent attempts to limit
pension fund investments and
new bank certification requirements**

by Donald L. Potts

Since the Sudan Divestment Act was found unconstitutional by a federal court, the Illinois General Assembly has reenacted its provisions while presumably avoiding the previous defects of the Act. In that same action, however, new requirements regarding banks and predatory lending laws will impact Article 3 and 4 pension funds.

The federal court ruled last year that the Sudan Divestment Act violated the Foreign Commerce Clause of the United States Constitution, which gives Congress the authority to regulate commerce with foreign nations. State laws that discriminate against commerce with a foreign nation are generally invalid. An exception to this rule, called the "market participant" exception, provides that states may regulate their own participation in foreign commerce. In other words, each state generally is free to determine how it will spend its own money. If a state decides that it does not want to conduct business with companies doing business in Sudan, it can refuse to do business with those companies. However, the court held that the State cannot restrict local pension funds (i.e. Article 3 and 4 pension funds) from engaging in commerce with foreign nations, and therefore struck down the Sudan Divestment Act. The State of Illinois initially planned to appeal the court's ruling, but ultimately dropped the appeal.

The first attempt to reinstate the Act was SB 1166, which provided that if a local pension fund exceeded its permitted investments in equities, the State Board of Investment would assume authority and responsibility for managing the fund's assets. Once the state controlled the local pension fund's assets, it could divest the fund of any assets subject to the Sudan restrictions. This bill was never voted on, and is likely dead.

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**New amendments to Pension Code provide
increased protections for firefighters**

by Ericka J. Thomas

The Illinois General Assembly recently passed an amendment to the Downstate Firefighters' Pension Code that affects the treatment of pensioners applying for disability pensions. Section 4-112 of the Illinois Pension Code provides: "A disability pension shall not be paid until disability has been established by the board by examinations of the firefighter at pension fund expense by 3 physicians selected by the board and such other evidence as the board deems necessary." (40 ILCS 5/4-112) Section 4-112 applies to both line-of-duty and non-duty disability pensions, and requires that three board-selected physicians examine the firefighter and report their findings to the board.

Previously, this section had been interpreted by Illinois courts to mean that Section 4-112 did not require either a concurrence of the three examining physicians that a firefighter was disabled or an opinion of one physician, let alone the concurrence of all three physicians, that a disability was duty-related. (*Village of Oak Park v. Village of Oak Park Firefighters Pension Board*, 362 Ill.App.3d 357 (1st Dist. 2005)) Effective October 11, 2007, the Illinois General Assembly amended Section 4-112 to unequivocally state: "The 3 physicians selected by the board need not agree as to the existence of any disability or the nature and extent of a disability." This amendment was approved despite Governor Blagojevich's specific request through amendatory veto that this language be deleted from the proposed amendment.

Interestingly, the amendment to Section 4-112 also included language that provides an employment safeguard for firefighters who are applying for disability pension benefits. Section 4-112 now provides, "No physical or mental disability that constitutes, in whole or in part, the basis of an application for benefits under this Article may be used, in whole or in part, by any municipality or fire protection district employing firefighters, emergency medical technicians, or paramedics as cause of discharge." This amendment guarantees that a firefighter will not be discharged from his employment while he is petitioning for a disability pension on the basis of the physical or mental disability at issue in the pension application. This language seems to follow the reasoning in the recent case of *Lynch v. City of Waukegan*, 363 Ill.App.3d 1078 (2nd Dist. 2006), which held that a firefighter cannot be discharged for cause based upon conduct that was substantially related to psychiatric problems that formed the basis for the firefighter's disability pension.

The amendment to Section 4-112 also added more definitive language concerning the reinstatement of firefighters who have re-

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Pension fund investments

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The second attempt was SB 1169, which reenacted the Sudan Divestment Act's provisions for "retirement systems, local pension funds, and large Article 3 and 4 pension funds." Ultimately, local pension funds and large Article 3 and 4 pension funds were removed from the bill, leaving only state retirement systems subject to the Sudan restrictions. "Retirement system" is defined in the bill as "the State Employees' Retirement System of Illinois, the Judges Retirement System of Illinois, the General Assembly Retirement System, the State Universities Retirement System, and the Teachers' Retirement System of the State of Illinois." Article 3 and 4 pension funds are not subject to the Sudan restrictions in what became enacted as P.A. 95-0521.

However, P.A. 95-0521 also contains a requirement that "Illinois finance entities" cannot accept money for investment or deposit from a pension fund unless it certifies annually that it complies with the High Risk Home Loan Act. Pension funds must divest any assets held by Illinois finance entities that fail to make the required certification. This requirement does apply to Article 3 and 4 pension funds.

Due to the narrow definition of "Illinois finance entity," many banks doing business with Illinois pension funds have declined to sign the certifications because they technically are not "Illinois finance entities" if chartered nationally or in another state. Banks that decline to sign the certifications for the pension fund should submit a letter to the pension fund board, indicating why it refuses to submit the certification. Any such letter received from a bank holding assets of the pension fund should be kept in the board's files, but need not be submitted to the Division of Insurance (DOI). The DOI has developed a standard certification form, and these certifications must be made by February 28, 2008, and annually thereafter. Certifications received by any pension fund must be filed with the DOI.

SB 1621, enacted as P.A. 95-0616 imposes restrictions on investments in Iran. However, similarly to SB 1169, these restrictions apply only to retirement systems which are defined as the same five statewide retirement systems covered by SB 1169. Article 3 and 4 pension funds are not restricted in their ability to invest in companies doing business in Iran. ■

Court examines definition of "act of duty" for police line-of-duty disability pensions

by Graham Liccardi

In evaluating an injured police officer's line of duty disability pension application, the proper focus of a court is not on the role the officer was acting in at the time of the injury, but rather the particular activities the officer was engaged in when injured. In *Fedorski v. Board of Trustees of Aurora Police Pension Fund*, 375 Ill.App.3d 371 (2nd Dist. 2007), the Illinois Appellate Court had an opportunity through the review of the denial of a police officer's line-of-duty disability pension application to clarify what constitutes an act of duty under Article 3 of the Illinois Pension Code.

On the day of his injury, Daniel Fedorski, an investigator for the City of Aurora Police Department, was assisting in a murder investigation as a street level evidence technician responsible for photographing a lineup at the Kane County jail. After completion of his lineup duties, Fedorski and two other officers left the jail in an unmarked car. The officers were returning to the Aurora police station to complete tasks relating to the investigation. Enroute to the police station, the officers stopped to return a camera Fedorski had used to photograph the lineup. While stopped at a red light, their automobile was hit from behind. As a result of the accident, Fedorski suffered disabling injuries prohibiting him from performing his police officer duties and applied for a line-of-duty disability pension. After conducting a hearing on his application, the board awarded him a non-duty disability pension. On administrative review, the circuit court upheld the board's decision, and Fedorski appealed the court's decision. The appellate court upheld the trial court's ruling.

The issue in the case turned on the court's interpretation of what actions taken by a police officer entail special risks and are considered "acts of duty." The Illinois Pension Code provides that a police officer disabled from service "as a result of sickness accident or injury incurred in or resulting from the performance of an *act of duty* ... shall be entitled to a disability pension" (emphasis added) (40 ILCS 5/3-114.1(a)) However, "a police officer who becomes disabled as a result of any cause other than an act of duty is entitled to a pension equal to 50% of the salary attached to the officer's rank..." (40 ILCS 5/3-114.2) For purposes of Section 3-114.1(a), the Pension Code defines "act of duty" as "[a]ny act of police duty inherently involving *special risk*, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a police man by the statutes of this State or by the ordinances or police regulations of the city in which the Article is in effect or by a special assignment." (emphasis added) (40 ILCS 5/5-113)

In *Johnson v. Retirement Board of Policemen's Annuity & Benefit Fund*, 114 Ill.2d 518 (1986), an injured officer was entitled to a line-of-duty pension because he was injured while performing an act of duty, responding to a citizen's request for help after a traffic accident. The *Johnson* decision clearly defines that an act of duty must be something involving risk not shared by ordinary citizens. In *Wagner v. Board of Trustees of Police Pension Fund*, 208 Ill.App.3d 25 (5th Dist. 1991), the court held that a police officer injured while serving a notice to appear in court is acting in a capacity of serious risk, and, therefore, was injured while performing an act of duty.

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Appellate court affirms board's authority to decide disability pension benefits

by Michelle Grotto

After considerable conflict in the appellate courts and heated debate among police pension practitioners, the Illinois Supreme Court has rendered an interpretation of Section 3-115 of the Illinois Pension Code (40 ILCS 5/3-115). In *Wade v. The City of North Chicago Police Pension Board*, 226 Ill.2d 485 (2007), the Illinois Supreme Court held that the Pension Code does not require that all three board-selected doctors find the officer disabled before benefits may be granted. Rather, the court held that three certificates or reports by board-selected physicians which address the issue of disability are required. The court also emphasized that a decision regarding disability benefits is for the pension board, not any individual physician.

The appellate courts have been split as to the proper interpretation of Section 3-115. One interpretation prohibits a board from granting a disability pension unless three practicing, board-selected physicians have filed certificates stating that the applicant is disabled due to a duty-related injury. (*Rizzo v. Board of Trustees of the Village of Evergreen Park Police Pension Fund*, 338 Ill.App.3d 490 (1st. Dist. 2003)) Other courts have interpreted the statute as only requiring three medical certificates which address an applicant's disability status. (*Coyne v. Milan Police Pension Board*, 347 Ill.App.3d 713 (3rd Dist. 2004)) Under the *Coyne* interpretation, even if one doctor certifies that an applicant is not disabled, the pension board can still award a disability pension.

The court found Section 3-115 to be ambiguous and examined Section 4-110 of the Illinois Pension Code to aid in its interpretation (40 ILCS 5/4-110). Section 4-110, which is the provision applicable to firefighters, emphasizes that a finding of disability shall be established by the pension board rather than any individual certifying physician. The court believed that this interpretation was the legislature's true intent for Article 3, finding it unimaginable that the legislature intended to treat Article 4 emergency responders differently than those under Article 3. Moreover, the court found the argument that a pension board could simply appoint a fourth physician to support its finding of disability should one of the first three find no disability to be unreasonable and wasteful, not to mention expensive and unjust.

The *Wade* decision appropriately places the power to decide whether a disability pension is due back in the proper hands—those of a pension board. ■

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Attorney Notes

- **OBKC&G, Ltd.** is pleased to announce that **Joseph Miller III** became a partner with the firm. Joe joined the firm in November 2000 and has focused his practice in municipal and education law. He graduated from the University of Illinois in 1991 with a bachelor's degree in Speech Communication and English. He attended Washington University School of Law and received his J.D. in 1994. Joe practices in our Naperville office.
- The firm is also pleased to announce that **William R. Thomas** joined the firm as an associate in December 2007. Bill focuses his practice in a variety of areas including municipal law, real estate, eminent domain, family law, as well as wills and estate planning. He attended Valparaiso University School of Law and received his J.D. in 1991. Bill practices in our Elburn office.
- Effective December 2007, the firm welcomes **David T. Zafiratos** as an associate. David graduated from Northern Illinois University in 2004 with a bachelor's degree in Political Science and received his J.D. in 2007 from Chicago-Kent College of Law. His practice will focus on municipal law, with an emphasis on fire protection districts and school districts. David will practice in the firm's Naperville and Joliet offices.
- For the third consecutive year, *Illinois Super Lawyers Magazine* recognized **Karl Ottosen** as a 2008 Illinois Super Lawyer in the area of Government Law. *Law & Politics* conducts a rigorous review, research, and selection process of nominated attorneys. Only five percent of attorneys in Illinois are recognized as Super Lawyers by their peers for their outstanding professional achievement.
- Congratulations to **Shawn Flaherty** on being selected as a "Rising Star" in the areas of Government/City/Municipal Law in the 2008 issue of *Illinois Super Lawyers Magazine*. This designation is awarded to the top 2.5% of Illinois attorneys who are under the age of 40 or have been practicing ten years or less. ■

New amendments to Pension Code

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covered from their disabilities. Previously, Section 4-112 provided that a recovered firefighter report to the fire chief who shall order reinstatement into active service. The old language did not specify a time frame for the reinstatement or address any payroll issues. The new language states that the fire chief shall order "immediate" reinstatement and "...the municipality shall immediately return the firefighter to its payroll..." The new language also provides a remedy for firefighters if a municipality does not take immediate action. Section 4-112 states, "[I]f the firefighter must file a civil action against the municipality to enforce his or her mandated return to payroll under this paragraph, then the firefighter is entitled to recovery of reasonable court costs and attorney's fees."

The practical implications of these amendments remain to be seen. However, one thing is very clear: pension boards and municipalities must monitor disability pension applicants and pensioners who have recovered from their disabilities. Without constant contact and monitoring, municipalities risk legal action for improper discharge or failure to reinstate promptly. ■

Otosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, **Legal Insights for Pension Boards**, is issued periodically to keep its 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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Definition of "act of duty"

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However, in *Morgan v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 172 Ill.App.3d 273 (1st Dist. 1988), the court upheld a non-duty pension award to a police officer whose chair rolled out from under him while completing a police report. Completing a report would seem to be an act of duty, but it is distinguished from serving a notice to appear because it does not "inherently involve special risk not ordinarily assumed by a citizen in the ordinary walks of life" for purposes of a line-of-duty disability pension. In *White v. City of Aurora*, 323 Ill.App.3d 733 (2nd Dist. 2001), the court followed the *Morgan* decision, holding that a police officer injured when writing a traffic ticket was not disabled while performing an act of duty. Since civilians are also employed to write traffic tickets, this act did not pose the special risk necessary to meet the Pension Code's standard for act of duty.

After reviewing relevant case law, the court concluded that when Fedorski was injured he was not performing an act of duty or acting in a capacity involving a special risk as defined by the Illinois Pension Code. The court reasoned that:

[T]he fact that the injury could have befallen anybody traveling in an automobile for any reason does not, in itself, foreclose a line-of-duty disability pension. Our focus is not on the precise mechanism of the injury, but on the capacity in which the officer was acting when injured, and, in particular, the special risks a police officer faces when acting in such a capacity.

Fedorski's main argument was that his capacity as an investigator performing the task of an evidence technician and taking photographs for a lineup constitutes an act of duty involving a special risk. This argument missed the point for two reasons. First, it is not clear that an evidence technician taking lineup photographs faces any particular risk. It did not help Fedorski's argument that law enforcement agencies could employ ordinary citizens to perform this work because there is no risk of injury. Second, the main reason Fedorski's argument was weak was that the capacity of the injured person is evaluated at the time of the injury. He was sitting in the backseat of a car not doing anything of risk or even pertaining to the duties of an evidence technician at the time of injury. The courts do not look to the fact that he was assisting in an "ongoing investigation" or that he was driving back to the police station as the act of duty.

The court concluded:

At the time of the accident, plaintiff was merely riding in an automobile and he faced risks essentially not different from those faced by any other automobile passenger. Nothing related to his duties as an evidence technician increased that risk. We therefore conclude that he was not performing an act of duty as defined by statute.

Fedorski did receive a non-duty disability pension, which warranted him 50% of his salary. ■

