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**Legal Insights**

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**Court considers definition of “act of duty” for purposes of disabled police officer’s pension claim**

by David Zafiratos

An Illinois appellate court was recently asked to review the meaning of “act of duty” for purposes of awarding a line-of-duty disability pension to a police officer in *Jones v. Board of Trustees of the Police Pension Fund of the City of Bloomington*, \_\_\_ Ill.App.3d \_\_\_, 2008 WL 4277492 (4th Dist. 2008). Officer Patrick Jones requested a line-of-duty disability pension after he was injured in a car accident while on duty. The accident occurred as Jones was driving a police transport van on patrol, on the way to investigate reports of speeders. The Board determined Jones was disabled, but only awarded him a non-duty disability pension.

Jones brought a complaint for administrative review against the Board, asking the court to reverse the Board’s decision to grant only a non-duty disability pension. The trial court reversed the Board’s decision and required it to award Jones a line-of-duty disability pension. The Board then appealed the trial court’s decision. The appellate court agreed with Jones and the trial court, holding that the officer’s injury did warrant a line-of-duty disability pension.

The appellate court’s opinion focused on the definition of an “act of duty” under Article 3 of the Illinois Pension Code. The court first explained that the definition of “act of duty” found in Article 5 of the Illinois Pension Code (which governs police pension funds in cities over 500,000) also applies to Article 3. Article 5 provides the following definition of an act of duty:

Any act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State or by the

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**Appellate court allows pension board to revisit erroneous increase in benefits**

by David Zafiratos

In *Fields v. Schaumburg Firefighters’ Pension Board*, 383 Ill. App.3d 209, 889 N.E.2d 1167 (1<sup>st</sup> Dist. 2008), the First District Appellate Court addressed the issue of a miscalculation by a Village employee that substantially increased a firefighter’s pension benefit. The court ultimately held the Board could rescind the erroneous increase because the Board itself had never officially taken action to award the increase.

In 1991, former Village of Schaumburg firefighter, Captain John Fields, began receiving disability pension benefits. In 1997, the disability pension benefits converted to a retirement pension. In 2002, his benefits increased by 15% because he had reached the age of 55 and at least five years had passed since the conversion of his disability benefits to a retirement pension.

In February of 2003, a Village of Schaumburg employee incorrectly determined the 15% increase was due in 1992 instead of 2002. Therefore, the employee increased Fields’ benefit by 43% to \$3,609.92 per month; however, Fields was only entitled to an annual 3% increase to \$2,607.88 per month. In addition, the employee erroneously issued a check for \$8,755.54 to Fields as back payment for benefits the employee believed the Fund owed Fields.

In July of 2003, the Village’s finance director sent Fields a letter explaining that the Village had awarded the back payment and the increase to \$3,609.92 per month in error. The letter stated Fields was entitled to \$2,607.88 per month and included a spreadsheet indicating Fields had received a total overpayment of \$14,768.22. A second letter sent in July of 2003 requested Fields repay a lump sum of \$8,756.00 and begin a repayment plan for the remainder of the overpaid amounts. In late October of 2003, an attorney for the Fund sent Fields a letter demanding the lump sum repayment within 30 days. Upon receipt of the demand letter, Fields retained an attorney.

Fields’ attorney countered the demand letter by requesting the \$3,609.92 per month be restored, arguing that:

- the increase was an administrative decision of the Board; and
- Section 3-103 of the Administrative Review Law prevented the Board from reversing its decision after 35 days. (735 ILCS 5/3-103)

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## Definition of “act of duty”

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ordinances or 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).

The court looked at prior cases where certain police functions were reviewed to determine whether they should be deemed acts of duty for pension-related purposes. For example, the court discussed *Morgan v. Retirement Board of the Policeman’s Annuity and Benefit Fund*, 172 Ill.App.3d 273 (1<sup>st</sup> Dist. 1988), in which a police officer was denied a line-of-duty disability pension after falling from a chair while writing a police report at a desk. In *Morgan*, the court determined that such an incident did not pose a special risk sufficient to be defined as an act of duty.

The court also reviewed the Illinois Supreme Court case of *Johnson v. Retirement Board of the Policeman’s Annuity and Benefit Fund*, 114 Ill.2d 518 (1986), in which a police officer was injured crossing the street to provide assistance to a citizen. In *Johnson*, the court determined that the act of walking across the street, while not inherently dangerous, did involve a special risk unique to police work because the officer had no choice but to cross the street and offer assistance. The court decided that since the officer was responding to a citizen’s call when he was injured, the injury did occur during the performance of an act of duty.

Relying on *Johnson*, the court in *Jones* explained that for an injury to satisfy the act of duty requirement, it is not necessary that the act of duty cause the injury. As long as the injury occurs “in the performance of an act of duty,” it qualifies for a line-of-duty disability pension. After providing several additional examples, the court ruled Jones did deserve a line-of-duty disability pension. It explained that since Jones was on patrol, and on his way to investigate an area with reports of speeders, he did face a special risk that met the requirement of an act of duty.

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## Erroneous increase

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When the Board refused Fields’ request to restore the increased benefit, Fields sued the Fund. In his lawsuit, Fields argued:

- the Board awarded him the \$3,609.92 pension and lacked the authority to reduce it; and
- the Board’s only option to appeal its decision to increase his pension was through administrative review, but the 35-day limitation had passed.

The trial court granted summary judgment for the Board, and Fields appealed. Fields posed three arguments to the appellate court. First, he argued the Board lacked any statutory authority to reduce his benefits. Second, he again argued the 35-day limitation for appeal under the Administrative Review Law prevented the Board from reversing its decision. Third, he relied on police pension case law to argue that the Board made an administrative decision that was subject to the Administrative Review Law.

The appellate court began by rejecting the notion that the recalculation of Fields’ pension benefits was an administrative decision of the Board. The increase was not awarded due to the Board’s action. Rather, a Village employee incorrectly determined Fields was entitled to the increase and simply made the change. Fields’ entire case rested on the premise that the increase was an administrative decision made by the Board. Once the court held otherwise, Fields’ remaining arguments failed as well.

Citing *Sola v. Roselle Police Pension Board*, 342 Ill.App.3d 227 (2<sup>nd</sup> Dist. 2003), the court explained that there was no communication between Fields and the Board regarding the increase to Fields’ pension, and thus it was not an administrative decision. Such communication would have established the very minimum requirement for an administrative decision subject to review under the Administrative Review Law. Further, the Board did not conduct any proceedings to consider granting an increase to Fields’ pension benefit.

The court stated that since the Board did not conduct proceedings resulting in a decision that was communicated to Fields, there was no administrative decision under the Administrative Review Law. Additionally, the court noted that Fields had not applied to the Board for the increase, nor had he ever actually argued he was entitled to the increase. Since the increase was not granted pursuant to an administrative decision, the Board could modify Fields’ monthly pension benefits. ■

**Effective November 3, 2008**

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## Have a HEART – enhanced benefits for employees called to military service

by Brian O'Connor

There is a myriad of benefit protections provided to employees called for military service under federal and state law. On June 17, 2008, a new federal law was enacted to provide additional protection. Public Law 110-245, the "Heroes Earnings Assistance and Relief Tax Act of 2008" or HEART Act, provides a number of benefit changes and enhancements.

As a threshold matter, governmental pension plans, including plans sponsored by states and units of local governments, must be amended to incorporate changes mandated by the HEART Act by the last day of the 2012 plan year. In Illinois, this may require legislative action by the Illinois General Assembly to amend the Illinois Pension Code or other applicable state statutes.

**Pension Benefits --** Section 104 of the HEART Act makes two changes to pension benefits. Section 104(a) provides that survivors of a plan participant who dies during qualified military service are entitled to any additional benefits that the pension plan would provide had the participant resumed employment and then passed away. This provision is applicable to qualifying participants who die during qualified military service on or after January 1, 2007.

Section 104(b) provides that plans *may* be amended to provide that the plan will treat a participating plan member who is killed or injured during qualified military service as having returned to employment the day preceding death or injury and terminating participation on the date of death or injury. This full or partial benefit must be applied to similarly situated individuals in a nondiscriminatory manner. This provision is applicable to qualifying participants who pass away or are injured on or after January 1, 2007.

**Payments and Distributions --** Section 105(b) of the HEART Act addresses an employee's compensation and distributions received or taken during military service. Beginning January 1, 2009, Section 105(b) provides that an employer *may* provide differential pay to an employee while on military service, but any such pay is deemed to be compensation (subject to IRS designation of compensation rules). Note that various state laws address pay for employees of units of local government; however, the pay differential may vary from full pay to no pay depending upon a variety of factors, such as purpose and length of military service. When facing the situation of an employee being called to military service, contact your attorney for advice on the pay, if any, due the employee. Differential pay provided under Section 105(b) must be applied to similarly situated individuals in a nondiscriminatory manner. In addition, Section 105(b) provides that differential pay received is considered compensation for the purpose of IRA contributions.

The second change to Section 105(b) begins January 1, 2009. Under this change an employee serving 30 or more days of active military duty will be considered severed from service for purposes of receiving distributions under various approved IRS de-

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## DOL issues advisory opinion regarding fiduciary rules and union activity

by Patrick Jesse

The U.S. Department of Labor (DOL) recently issued an advisory opinion in response to a U.S. Chamber of Commerce inquiry concerning whether the fiduciary rules of the Employee Retirement Income Security Act of 1974 (ERISA) allow the use of plan assets to promote union organizing campaigns and union goals in collective bargaining negotiations. The request for guidance on this issue stems from unions becoming increasingly aggressive in using their members' retirement funds in organizing campaigns and negotiating contracts. (See U.S. Chamber of Commerce, June 26, 2008 Press Release available at [www.uschamber.com](http://www.uschamber.com)) Sections 404(a)(1)(A) and (B) of ERISA provide the general framework for guidance on this issue and require each plan fiduciary to perform his or her duties prudently and solely for the purpose of providing benefits to participants and beneficiaries of the retirement plan. These sections also require each plan fiduciary to pay reasonable expenses to administer the plan.

The DOL has long taken the position that the requirements outlined in §§404(a)(1)(A) and (B) prohibit fiduciaries from placing other interests and objectives above their primary responsibility of benefiting the participants and beneficiaries of the plan. More specifically, the DOL has taken the position that plan fiduciaries may not increase expenses, sacrifice investment returns or reduce the security of plan benefits in order to promote other unrelated goals. (See ERISA Advisory Opinion No. 2007-07A (December 21, 2007)) Even though these plans are important components in the national economy and are affected by economic changes, §§404(a)(1)(A) and (B) do not allow policy proposals for plan assets that concern broad economic agendas. (See letter from Alan D. Lebowitz, Deputy Assistant Secretary for Program Operations, Employee Benefits Security Administration, U.S. Department of Labor, to Jonathan P. Hiatt, General Counsel, AFL-CIO (May 3, 2005))

The §§404(a)(1)(A) and (B) and guidance issued by the DOL clearly state that a fiduciary should consider only the best interests of retirement plan participants and beneficiaries

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### Definition of "act of duty"

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The *Jones* case provides an example of the special risk required in the performance of police duty to meet the definition of "act of duty" under the Illinois Pension Code. This decision should serve as a guide to police pension boards when determining if an injured officer is entitled to a non-duty or a line-of-duty disability pension. ■

### DOL advisory opinion

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when evaluating a particular investment. Investment decisions should not be influenced by a need to promote a particular industry or industry member. An exception to this rule would only occur if the investment was economically equal or superior to an available alternative investment. (See, e.g., Letter to the Honorable Jack Kemp (November 23, 1990); ERISA Advisory Opinion 88-16A (December 19, 1988); Letter to James S. Ray (July 8, 1988); Letter to Reed Larson (July 14, 1986); Letter to Ralph P. Katz (March 15, 1982))

In applying these investment rules, the DOL maintains that using plan assets to promote union organizing campaigns and union goals in collective bargaining negotiations subordinates the interests of retirement participants and beneficiaries. Consistent with ERISA §§404(a)(1)(A) and (B), fiduciaries may not increase expenses, sacrifice investment returns, or reduce the security of plan benefits to promote or oppose union organizing goals or collective bargaining objectives. ■

### HEART Act

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ferred compensation plans. If an employee takes distributions under this provision, he or she may not make additional salary deferral contributions until six (6) months after the date of such distribution.

Section 107 of the HEART Act extended the period for exemption from additional tax for early withdrawals from a salary deferral plan or IRA for an employee for qualified military service. The original exemption period was from September 11, 2001 to December 31, 2007. The amendment deletes the end date of the eligibility period, so that the favorable tax treatment for distributions is available to any individual for qualified military service occurring after September 11, 2001.

**Health Care Flexible Spending Accounts** -- Finally, Section 114 of the HEART Act provides that an employee called or ordered to active duty for 179 or more days (or indefinitely) may receive all or any portion of his or her health care flexible spending account (permitted under Section 125 of the Internal Revenue Code) without jeopardizing the eligibility of the employer's Section 125 plan. Any distribution received under this provision must be made between the date of the order to active duty or military service and prior to the last day on which the distribution could normally be received under the plan provisions. This change became effective June 17, 2008. ■

### Attorney Notes

- **Congratulations to Donald Potts**, an associate with the firm's Naperville office, who was promoted to the rank of Major in the Army Reserve. Don is currently on active duty in Baghdad serving as an Operational Law Planner in the office of Strategy, Plans and Assessments at Multi-National Force-Iraq headquarters. Don's tour of duty is expected to end in June 2009.
- The Kane County Bar Association recognized **Bob Britz** for his previous five years of service, including his service as President of the 1,200 member Association at its Annual Dinner held on June 12, 2008. ■

Ottosen 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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