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Illinois Supreme Court determines Illinois Pension Code does not provide for annual increases to surviving spouses

by Matt Roeschley

On March 19, 2009, the Illinois Supreme Court issued its written opinion in the case of *Roselle Police Pension Board v. Village of Roselle*, ___ Ill.2d ___, 2009 WL 711335 (2009). In *Roselle*, the court considered whether the surviving spouse of a Village of Roselle police officer was entitled to receive annual "cost of living" increases on the pension awarded to her following the death of her husband, who had been granted a "line of duty" disability pension and at the time of his death was receiving annual benefit increases based on having attained the age of 60.

Originally, the Roselle Police Pension Board found that Bonnie Gurke, the widow of deceased former police officer Charles Gurke, was entitled to the annual three-percent benefit increases her husband had been receiving at the time of his death. The Village, which intervened in the Board's proceedings, disagreed and filed a petition for administrative review in the circuit court of DuPage County. The circuit court reversed the Board's decision to grant Mrs. Gurke the annual increases, and the appellate court later affirmed the circuit court's decision.

The Illinois Supreme Court granted the Board's petition for leave to appeal, considering the question of annual benefit increases for surviving spouses. At issue was the language of

Section 3-114.1(d) of the Illinois Pension Code, which states that disabled police officers who have been receiving "line of duty" disability pensions "for a period which, when added to the officer's total service credit in the Fund, equals at least 20 years, shall be eligible to receive an annual noncompounded increase in his or her pension under this Section, equal to 3% of the original pension." (40 ILCS 5/3-114.1(d)) This language, however, does not address the transfer of such eligibility for annual increases to surviving spouses upon the death of the disabled officer.

The Board argued that the language of Section 3-112(a) of the Illinois Pension Code, generally entitling surviving spouses to the pension benefits the disabled officer received before his death, allows spouses to "step into the shoes" of the officer for the purpose of receiving annual benefit increases under Section 3-114(d). The Illinois Supreme Court rejected this argument, finding that no provision of Article 3 of the Code expressly authorizes the continuation of annual benefit increases to surviving spouses, noting the contrast between Article 3 and numerous other articles of the Code which expressly grant the continuation of such increases to spouses or other survivors. The Court found this contrast important in holding that the continuation of annual benefit increases was not authorized under Section 3-114(d).

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Court clarifies light duty interplay with receipt of pension benefits

by David Zafiratos

The Illinois appellate court determined the Chicago police pension board wrongfully denied a pension to a disability applicant when it determined the applicant was not disabled in *Kouzoukas v. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 383 Ill.App.3d 942 (1st Dist. 2008). This case presents examples of two important issues affecting employers and pension boards: (1) the court's legal justification for overturning a pension board's decision to deny a disability pension application, and (2) the requirements for placing an employee on light duty instead of a disability pension.

Manifest weight of the evidence standard

In *Kouzoukas*, a police officer injured her back during an altercation with an intoxicated man who resisted her offer of assistance. Following that incident, and for the next fifteen months, the officer underwent medical treatment from several doctors but continued to suffer from back pain. Also during that time, the officer alternated between medical leaves of absence and light duty assignments. Following a hearing, the Board denied the officer's request for a disability pension, finding she was not disabled.

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Pension Reform Law expands required annual tax levy report

by Carolyn Welch Clifford

One of the often overlooked requirements in the Illinois Pension Code has been the annual tax levy report that fire and police pension funds have been required to submit to the city council, village or fire protection district board of trustees each year. Under Sections 3-143 and 4-134, the fire or police pension board is required to report annually to the city council or board of trustees of the village or fire protection district on the condition of the pension fund at the end of its most recently completed fiscal year. (40 ILCS 5/3-143 and 4-134). This report must be made prior to the council or board's annual tax levy meeting for which the report is prepared.

In the past pension boards have relied upon audit and actuary reports to essentially transmit the information required under these statutes to the council or board. Under the new amendments, fire and police pension boards must now

Pension boards must submit an annual tax levy report each year.

specifically certify and provide in a formal report for tax levy (now often re-

ferred to as the "municipal compliance report") the following information:

- The total assets of the fund and their current market value (40 ILCS 5/3-143(a)(1) and 4-134(a)(1)). Some funds have chosen to list not only the current fiscal year's total assets, but also the preceding fiscal year's total assets, in order to provide a comparison in the report.
- The estimated receipts during the next succeeding fiscal year from deductions from the salaries or wages of police officers/firefighters, and from all other sources (40 ILCS 5/3-143(a))

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The officer filed a complaint for administrative review successfully challenging the Board's decision. The Board appealed the trial court's ruling; however, the appellate court agreed with the trial court's finding that the officer was entitled to a disability pension.

The Board had denied the officer's application because it found the only proof of her disability was subjective complaints of pain to her doctors. The Board decided that none of the doctors sufficiently established an objective finding to allow a conclusion that the officer was in fact disabled. In its written opinion, the appellate court provided extensive detail on the officer's medical treatment. In ruling that the Board erred in declaring the officer not disabled, the court explained that "the overwhelming weight of the medical evidence" called for a conclusion that the officer's pain prevented her from returning to duty.

The court explained that a pension

board's decision on factual matters will only be overturned if it is against the manifest weight of the evidence. In reviewing factual determinations, courts decide if the administrative record contains sufficient evidence to support a pension board's decision. That standard of review makes it difficult to successfully challenge a pension board's factual findings. Such deference to the administrative body is justified by the idea that the pension board heard the evidence and was in the best position to decide the facts of the case. Nonetheless, in *Kouzoukas*, both the trial court and the appellate court held the Board's decision was against the manifest weight of the evidence.

Light duty option

The court in *Kouzoukas* also discussed the important difference between an employee who is disabled for service and an employee who is disabled for a full duty position. The Illinois Pension Code as it pertains to police and fire-

fighters, provides for disability pensions only if an employee is "disabled for service" in the police or fire department. Courts have held that an injured employee is not "disabled for service" if capable of performing a light duty assignment.

The issue, however, is not quite that simple. As the *Kouzoukas* court and other courts have explained, certain conditions apply. First, the light duty position must already exist at the time the firefighter or police officer is injured and applies for a disability pension. Second, an employer may not create a light duty position specifically to avoid awarding a disability pension. Third, the employer must offer the light duty assignment to the firefighter or police officer once it learns the individual is only capable of performing such duties.

In *Peterson v. Board of Trustees of the Firemen's Pension Fund of the City of Des Plaines*, 54 Ill.2d 260 (1973), the Illi-

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(2) and 4-134(a)(2)). “Other sources” will include investment earnings and municipal contributions.

- The estimated amount necessary during the next fiscal year to meet the annual actuarial requirements of the pension fund (40 ILCS 5/3-143(a)(3) and 4-134(a)(3)). In addition to the actuarial recommendation from the Division of Insurance (DOI), this report should also list the actuarial required contribution as determined by any private actuary hired by the city, village or fire protection district, or hired by the fund itself.
- The total net income received from investment of assets along with the assumed investment return and actual investment return received by the fund during its most recently completed fiscal year compared to the total net income, assumed investment return, and actual investment return received during the preceding fiscal year (40 ILCS 5/3-143(a)(4) and 4-134(a)(4)). Some funds have chosen to show both the current and preceding fiscal year information in this portion of the report. Note that the assumed investment return should be provided from the DOI’s actuarial report (currently 7%), as well as this assumption from any private actuary report.
- The increase in employer contributions that results from the implementation of P.A. 93-689, which provided for firefighters to combine creditable service and enhanced surviving firefighter spouse pension benefits (40 ILCS 5/4-134(a)(5)). This information is obviously only required in fire-

fighter pension fund reports. However, for any non-home rule municipality, as well as all fire protection districts that are subject to the Property Tax Extension Limitation Law (35 ILCS 200/18-185 *et seq.*), this portion of the required tax levy for the fund will be levied outside the tax cap and should be specifically delineated on the village, city or fire protection district’s levy ordinance.

- The total number of active employees who are financially contributing to the fund. (40 ILCS 5/3-143(a)(5) and 4-134(a)(6))
- The total amount that was disbursed in benefits during the fiscal year, including the number of and total amount disbursed to (i) annuitants in receipt of a regular retirement pension, (ii) recipients being paid a disability pension, and (iii) survivors and children in receipt of benefits (40 ILCS 5/3-143(a)(6) and 4-134(a)(7)). These items should be shown by category as well as in total.
- The funded ratio of the fund (40 ILCS 5/3-143(a)(7) and 4-134(a)(8)). This ratio should be shown as determined by the DOI’s actuarial report, as well as by any private actuary report.
- The unfunded liability carried by the fund, along with an actuarial explanation of the unfunded liability (40 ILCS 5/3-143(a)(8) and 4-134(a)(9)). This figure should be shown as determined by the DOI’s actuarial report, as well as by any private actuary report. Note that the “actuarial explanation of the unfunded liability” can be a generic explanation of unfunded liability.

- The investment policy of the pension board under the statutory investment restrictions imposed on the fund (40 ILCS 5/3-143(a)(9) and 4-134(a)(10)). A copy of the fund’s most current investment policy should be provided as an attachment to the actual tax levy report.

The fund’s accountant – whether an in-house finance director or an outside accounting firm – should annually prepare this report for the board of trustees at a meeting held after the fund’s audit report has been completed, the annual DOI report submitted, and actuarial reports received. The board should carefully review the report and take official action at its meeting to adopt and certify the report before it is submitted to the city, village or fire protection district.

Under the new amendments, the city, village or fire protection district is authorized to publish the report in a local newspaper or on its website. If published, the city, village or fire protection district must publish the report in its entirety; the publication must include all of the information submitted by the pension board in the tax levy report (40 ILCS 5/3-143(b); 40 ILCS 5/4-134(b)).

In its summary of the “Municipal Public Safety Pension Reforms” published in October 2008, the Illinois Municipal League has strongly encouraged its members to publish these tax levy reports. The IML has also encouraged its members to invite and expect the attendance of the entire pension board at a meeting to discuss the board’s report. Fire and police pension boards should use this opportunity to engage in an educated and meaningful exchange with the city council, the village board or the fire protection district trustees regarding the financial health of the fund, the actuarial assumptions used in determining the appropriate tax levy for the fund, and the employer’s historical contributions to the fund, as well as its future obligations to the fund. ■

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The *Roselle* decision distinguishes the 2003 Second District Court of Appeals decision in *Sola v. Roselle Police Pension Board*, 342 Ill.App.3d 227 (2nd Dist. 2003), which affirmed the award of annual increases to a surviving spouse on procedural grounds not related to the substantive interpretation of Section 3-114(d).

While the *Roselle* case involved a disabled police officer and Article 3 of the Code, which applies exclusively to police pensions, the decision also holds implications for firefighter pension funds as well. Similar to Article 3, Article 4 of the Code, which applies to firefighter pensions, does not expressly provide for the continuation of annual “cost of living” increases to surviving spouses. Therefore, the Illinois Supreme Court’s rationale in *Roselle* would likely extend to surviving spouse benefits under Article 4 should a firefighter pension board’s denial of such increases ever become subject to a legal challenge. ■

* *Editor’s note: Ericka J. Thomas, an OBKC&G, Ltd. associate, successfully represented the Village of Roselle before the Illinois Supreme Court in this case.*

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nois Supreme Court approved placing a pension applicant in a light duty position instead of awarding a disability pension. The pension board found the applicant was not disabled for service in the fire department because the applicant’s heart condition did not prevent him from serving on the fire prevention bureau. Importantly, when denying the applicant’s request for disability benefits, the pension board made a specific finding of fact as to the existence of necessary light duties within the fire prevention bureau. The pension board in *Peterson* also made findings of fact that the fire prevention bureau position was available and would be offered to the applicant.

In contrast to the *Peterson* case, the pension board in *Thurrow v. Police Pension Board of the Village of Fox Lake*, 180 Ill.App.3d 683, 691 (2nd Dist. 1989), denied a request for disability benefits because the applicant could physically perform a light duty position, but failed to sufficiently substantiate that a legitimate light duty position existed. The court ordered the case back to the pension board for a more definite finding of fact regarding the existence of a light duty position. In *Danko v. Board of Trustees of the City of Harvey Pension Board*, 240 Ill.App.3d 633 (1st

Dist. 1992), another pension board denied an applicant’s disability pension request, citing the existence of a light duty position the applicant could physically perform. In that case, however, the trial court overturned the pension board’s decision stating that the light duty job was a “hoax” created specifically to disadvantage the applicant. The appellate court agreed and stressed that an employer may not simply create a light duty job to avoid paying disability benefits.

In *Kouzoukas*, the Board heard evidence that the officer was fit to perform light duty work. The Board also heard testimony regarding the existence of a light duty position to which the officer could have been assigned. However, the police department never offered the officer light duty when it learned she was physically capable of performing such work. Therefore, the Board was unable to justify denying the officer’s disability application based on the fact that she was physically able to perform light duty. Note that the Illinois Supreme Court has granted the pension board’s petition to review this case which may provide an opportunity for additional guidance to pension boards on this difficult issue. ■

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