

LEGALINSIGHTS

FOR PENSION BOARDS

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When is a firefighter not a firefighter for pension purposes?

by John H. Kelly

In *McLear v. Village of Barrington*, 392 Ill.App.3d 664 (2nd Dist. 2009), the Second District Appellate Court ruled that three Barrington Fire Department employees were not “firefighters” as defined by Article 4 of the Illinois Pension Code. The court’s ruling prohibited three employees from transferring service time earned in the Illinois Municipal Retirement Fund to the firefighters’ pension fund. In *McLear*, the Village of Barrington hired three employees prior to establishing a full-time fire department in 1995. At their time of hire, a paid on-call, non-profit organization, the “Barrington Fire Department, Inc.,” provided contractual fire protection services to the Village.

In 1975, the Village of Barrington hired Feit, one of three firefighters seeking the pension credit as a Mobile Intensive Care Specialist. Additionally, his position with the Village included paramedic duties and some firefighting activities. Charlene McLean was hired by the Village of Barrington as a full-time Emergency Medical Technician II in the emergency services department of the Village and was occasionally required to perform firefighting duties. In 1980, the third employee, Christian Toussaint was hired as a full-time Emergency Medical Technician II in the emergency services department, and like Feit and McLean, he performed occasional firefighting duties. All three employees were members of the Barrington Fire Department, Inc.

In 1995, the Village’s Board of Fire and Police Commissioners appointed them to the Barrington Fire Department as firefighters. At that same time the Village established an Article 4 firefighters’ pension fund thereby ceasing their IMRF contributions and beginning their contributions to the firefighters’ pension fund.

In 2005, the three employees filed a complaint in the Cook County Circuit Court, asking the court to classify them as “firefighters” under Article 4 of the Illinois Pension Code (40 ILCS 5/4-101) and to order the Village to transfer all of their creditable years of service and contributions from IMRF to the firefighters’ pension fund. On February 14, 2008, the court determined the three employees were not firefighters within the meaning of Article 4 and were not eligible for the transfer of their IMRF service credit to the firefighters’ pension fund.

The plaintiffs appealed the court’s decision, arguing they were firefighters from the time of their hire until 1995 because they participated in firefighting duties for the Village and the Village was aware of their firefighting duties. The Village, on the other hand, argued the three employees were not firefighters until their appointment by the Board of Fire and Police Commissioners in 1995. Prior to that time, the Village maintained, it employed them

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Court limits police board’s ability to recalculate pension payments

by Thomas J. Gilbert

In *Kosakowski v. Calumet City Police Pension Fund*, 389 Ill.App.3d 381 (1st Dist. 2009), the Illinois First District Court of Appeals clarified the definition of an “error” in determining a police pension board’s authority to recalculate benefits and correct overpayments. In *Kosakowski*, the Board initially calculated and awarded his line-of-duty disability pension based on his salary at the time he last received workers’ compensation benefits. Nearly three and a half years later, after obtaining an advisory opinion from the Illinois Department of Insurance, the Board recalculated Kosakowski’s pension based on his salary as of the last day he made pension contributions and determined that he had received an overpayment totaling \$4,840.56.

In a letter to Kosakowski, the Board explained it had reduced his pension to the correct amount and would deduct \$403.38 each month for 12 months to resolve the \$4,840.56 overpayment. Kosakowski disagreed with the Board’s decision and sought administrative review, asking the court to reverse the reduction of his pension benefits, reinstate his original pension amount, and invalidate the Board’s plan to reduce his monthly pension benefit to offset the overpayment.

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Court rules treasurer must make payments ordered by pension board

by David Zafiratos

In *Morris v. Harper*, 393 Ill.App.3d 624 (5th Dist. 2009), the Illinois appellate court ruled a city treasurer was required to comply with a pension board's directive to pay pension benefits in the amount determined by the pension board.

David Morris, James Riden, Ronald Talley, Arthur Gillispie, and Kenneth Childers, as trustees of the Harrisburg Police Pension Fund, brought a lawsuit against Richard Harper, treasurer for the City of Harrisburg, asking a court to order Harper to pay benefits as directed by the Board. The circuit court granted the trustees' request, and entered an order for *mandamus* requiring Harper to

pay the benefits as determined by the Board.

The case centered on the Board's calculation of four retirees' pensions, and Harper's belief that the Board incorrectly included certain payments as "salary" for purposes of determining the pension amounts. Harper contended the pension benefits awarded to the four retirees were based on higher than appropriate salaries, and refused to pay benefits greater than he believed to be permitted by law. An Illinois Department of Insurance audit showed the Board's original pension determinations were based on salaries that included a \$6,000 retirement incentive. One of the

pensions was also based on a salary that included a clothing allowance.

In a January 18, 2007, letter to the Board, Harper explained the Board's mistake and recommended the Board amend the pension amounts to conform to the Department of Insurance audit. The Board did not respond, yet Harper unilaterally reduced the pension payments without the Board's approval.

The circuit court granted the Board's request for *mandamus*, thereby ordering Harper to pay the pension amounts as determined by the Board. In doing so, the circuit court determined Harper did not

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Court limits recalculation of pension benefits

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Section 3-144.2 of the Illinois Pension Code provides that "[t]he amount of any overpayment, due to fraud, misrepresentation or error, of any pension benefit granted under this Article may be deducted from future payments to the recipient of such pension or benefit." (40 ILCS 5/3-144.2) If an overpayment results from fraud, misrepresentation, or error, police pension boards are authorized only to correct overpayments after the expiration of a 35-day administrative review period. In *Kosakowski*, the Board argued that its decision to award the initial pension amount was an "error" under Section 3-144.2. Since the 35-day administrative review period had expired, the only way the Board could change the pension amount was to claim an error through Section 3-144.2.

In *Rosler v. Morton Grove Police Pension Board*, 178 Ill.App.3d 769 (1st Dist. 1989), the appellate court limited the definition of "error" under Section 3-144.2 to the board's inadvertent miscalculation of the pension benefit. In *Rosler*, the Board did not argue its over-

payment was the result of a miscalculation. The court in *Kosakowski*, however, rejected the narrow definition of error in *Rosler* and declined to extend that definition of error to the Board's overpayment of Kosakowski's pension, explaining that had the legislature intended such a definition, it would have been stated in the statute.

The Board argued the error occurred when it based Kosakowski's pension on his April 2004 salary and not his January 2003 salary. The court held that the Board's change in interpretation of the Illinois Pension Code did not constitute an "error" under Section 3-144.2.

In rejecting the Board's argument and holding in favor of Kosakowski, the court indicated that the Illinois Department of Insurance's advisory opinion to the Board did not establish the existence of a Section 3-144.2 error. Instead, the court explained that Illinois Department of Insurance opinions are "advisory services" which pension boards are not

mandated to follow. Therefore, the Board could not correctly state that the initial pension award was an error simply because the Illinois Department of Insurance disagreed with the salary date used to calculate the pension. Since the Board paid Kosakowski exactly what it had determined to be the correct amount, the court determined no error had occurred.

Kosakowski highlights the importance of carefully determining the proper pension amount before officially awarding a pension. The specific dilemma for the Board in *Kosakowski* was incorrectly identifying the salary date upon which it based the pension benefit. Identifying the appropriate salary can be complicated when pension applicants receive continuation of salary benefits under the Public Employee Benefits Act or another form of paid leave of absence. Prior to awarding pension benefits, a pension board should conduct a thorough analysis of the Illinois Pension Code requirements, as well as obtain an advisory opinion from the Illinois Department of Insurance, if necessary. ■

Court defines “firefighter” for pension purposes

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as paramedics *only* and properly covered them under IMRF.

In deciding this case, the court focused on the specific language of Section 4-106(b) of the Illinois Pension Code (40 ILCS 5/4-106(b)) which defines firefighters as a “firefighter, fire engineer, marine engineer, fire pilot, bomb technician or scuba diver, and, in any of these positions whose duties also include those of a firefighter and one certified in the same manner as a firefighter in that city.” The court held that the plain language of Section 4-106(b) of the Pension Code did not include the terms “emergency medical technician” or “paramedic.” The court distinguished the case from *Board*

of Trustees of Fireman’s Pension Fund of City of Park Ridge v. Department of Insurance 109 Ill.App.3d. 919 (1st Dist.

**For pension purposes,
Section 4-106(b) of the
Illinois Pension Code
specifically defines
the term “firefighter.”**

1982) in which another court held that paramedics could be considered firefight-

ers for pension purposes when they were already appointed firefighters. The *McLear* court held that to be classified as a “firefighter” for pension purposes, the individual must be employed in one of the positions listed in Section 4-106(b), perform firefighting duties as part of that position, and be certified in the same manner as a firefighter. The court found the legislative intent to limit the definition of “firefighter” was clear from the plain language of Section 4-106(b).

Note that the plaintiffs filed a petition with the Illinois Supreme Court for review of this case, which the court denied on September 30, 2009. ■

Treasurer must make payments ordered by pension board

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have the authority to change the pension benefits. Harper then appealed the circuit court’s ruling.

The appellate court agreed with the circuit court, ruling that a *mandamus* order against Harper, requiring that he comply with the Board’s direction, was appropriate. In so ruling, the appellate court explained that *mandamus* is used to compel an action that is purely ministerial and does not involve the use of discretion by the defendant. The circuit court’s order of *mandamus* against Harper would be appropriate if: (1) paying the pension amounts as authorized by the trustees was Harper’s official, nondiscretionary duty; (2) the trustees were entitled to have the pension paid as they determined it; and (3) Harper had failed to perform as required. After answering all three inquiries in the affirmative, the appellate court upheld the circuit court’s *mandamus* order.

Section 3-132 of the Illinois Pension Code states the treasurer of a police pension fund is only authorized to make

payments as directed by the board of trustees of the pension fund (40 ILCS 5/3-132). Section 3-132 states, “All money received or collected shall be credited by the treasurer of the municipality to the account of the pension fund and held by the treasurer of the municipality *subject to the order and control of the board.*” (emphasis added) Based on this language, the appellate court held Harper’s duty to pay the pension benefits was in fact a nondiscretionary duty.

The appellate court also explained Section 3-133 of the Illinois Pension Code gave the Board the authority “to order payment of pensions and other benefits.” (40 ILCS 5/3-133) This satisfied the second inquiry – whether the trustees were entitled to have the pension paid as they determined it. Finally, the appellate court noted that it was undisputed that Harper had not paid the retirees the amounts determined by the Board. The third requirement for *mandamus* was therefore met as well. Harper had failed to perform as required.

It is important to note that this decision speaks only to the respective authority of Harper, as City Treasurer, and the Board. The appellate court was not asked to address whether the retirees’ pensions were in fact incorrectly calculated. Instead, the appellate court simply ruled it was the Board’s duty to calculate and order payments, and it was Harper’s responsibility to pay pension benefits as directed by the Board.

Note also that Public Act 95-950, effective August 29, 2008, added Section 3-141.1 to Article 3 of the Illinois Pension Code (40 ILCS 5/3-141.1). Section 3-141.1 requires police pension boards to inform the treasurer of their calculations of pension awards. If, in the treasurer’s opinion, the pension benefit was incorrectly calculated, the treasurer must notify the police pension board. The police pension board is then required to review the treasurer’s findings. The police pension board, however, retains the decision-making authority, and is only required to recalculate the pension if it concurs with the treasurer’s findings. ■

Veterans in the fire service now entitled to an opportunity to receive additional creditable service time for military service

by Ericka J. Thomas

Earlier this year, the Illinois General Assembly amended Article 4 of the Illinois Pension Code in an effort to further recognize the service of military veterans. The Article 4 definition of "creditable service" has always allowed firefighters to receive up to five years of credit for serving in the military when the person was already an active firefighter (40 ILCS 5/4-108(c)(1)). Effective April 10, 2009, a firefighter may now receive up to twenty-four (24) months of credit for service in the military *prior* to his or her employment as a firefighter (40 ILCS 5/4-108(c)(1.5)) under P.A. 95-1056.

To obtain this credit, the firefighter must be in active service as a firefighter on or after April 10, 2009. The firefighter must apply in writing to the firefighters' pension fund to receive credit for his or her military service. As proof of the firefighter's military service, the pension fund can accept discharge or separation documents, the DD Form 214, or a Certificate of Release or Discharge from Active Duty. The firefighter must also make the required contributions to the firefighters' pension fund. Note that the statute does not require that the firefighter purchase a full two years of service; rather, the firefighter

may choose how much creditable service (up to two years) he or she wishes to purchase.

The required contributions that a firefighter must make to a pension fund to capture this enhanced benefit are calculated through a complicated formula. The firefighter must make contributions equal to both the employee *and* employer contributions that would have been required had the firefighter been working in the fire service, along with interest.

To calculate this contribution, the Illinois Department of Insurance has issued a *Siren* dated August 19, 2009, which indicates that there are three components to the contribution calculation:

1. **The employee contributions that would have been required had service been rendered as a member** ~ To calculate this amount, the salary to use in computing the contributions is the entry salary of the firefighter at the first date of membership in the fund.
2. **The employer's normal cost of the benefits accrued for that military service** ~ The firefighter must also

contribute an amount equal to the employer's normal cost of the benefits. The Illinois Department of Insurance notes that the employer normal cost amount is provided on the Illinois Department of Insurance's annual actuarial valuation balance sheet.

3. **Interest on the employee and employer contributions** ~ The firefighter must contribute interest at the applicable actuarially assumed rate provided by the Department of Insurance, compounded annually from the first date of membership in the fund to the date of payment of the contributions. Prior to 1987, this rate equaled 6.5%, while after 1987, the rate equals 7%.

The value of this enhanced benefit will be different for firefighters at different points in their careers. Those active members of the fire service with many years of service may find that it is cost prohibitive to attempt to capture this additional time, while those firefighters just beginning their careers may find it beneficial to take advantage of this opportunity to capture up to two additional years of service. ■

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OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

1804 North Naper Boulevard, Suite 350

Naperville, Illinois 60563

(630) 682-0085 www.obkcg.com FAX (630) 682-0788

Carolyn Welch Clifford, Editor cclifford@obkcg.com

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