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NATIONAL CASE LAW UPDATE

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CONSTITUTIONAL CASES

Florida Supreme Court Strikes Down Unilateral Reductions in Pension and Wage Benefits for Violation of Constitutional Right to Collectively Bargain.

In the summer of 2010, the City of Miami, faced with a budget crunch, used a little known provision of the state bargaining law called the “Financial Urgency” statute. The law allowed a public employer with serious financial troubles to accelerate the bargaining process. If the parties were at an impasse after that accelerated period, then the contract could be resolved in accordance with the impasse resolution process. Rather than follow that process, Miami simply altered the collective bargaining agreements substantially cutting wages and benefits. The unions filed unfair labor practices which were dismissed and the dismissal was upheld by a state appeals court. At the same time the City of Hollywood (Florida) did the same thing. The state labor board also ruled against the union, but a different state appeals court ruled for the union finding the City of Hollywood had violated the constitutionally-protected contract rights and bargaining rights of the employees.

Because of a conflict between two appeals courts, the Florida Supreme Court agreed to review the case. In a long awaited decision, the Supreme Court agreed with the unions. Florida is one of only a handful of states where collective bargaining for public workers is in the state constitution. The Supreme Court held that the actions of the cities violated the fundamental rights of contract and the right to meaningful collective bargaining. The Court held that constitution was a limit on the power of government and the cities had exceed that limit. The decision invalidated the actions taken and has left the cities facing substantial damage claims for back pay and pension benefits.

Walter E. Headley Miami FOP Lodge 20 v. City of Miami, 215 So. 3d 1 (Fla. 2017)

California Appeals Court Rewrites “California Rule.”

In an effort to respond to the rise of “pension spiking,” the California Legislature enacted the California Public Employees’ Pension Reform Act of 2013. The act made significant changes to how pension benefits would be calculated. Three weeks after the act was passed, five labor unions together with a number of individuals currently employed by Marin County instituted an action against the Marin County Employees’ Retirement Association (MCERA). On August 17, 2016, a state appellate court in San Francisco unanimously ruled that the Pension Reform Act was

not unconstitutional as it applied to the plaintiffs' rights. While the main issue of the case was to prevent employees from boosting their benefits, the court went beyond the issue of spiking and addressed the broad constitutional protection provided by the California Rule, which prohibits virtually any changes from being made to pension benefits once they are given.

In 1983, The Supreme Court of California stated, in *Allen v. Board of Administration*, "Any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and when resulting in disadvantages to employees, must be accompanied by comparable new advantages." In addressing this case, the appellate court determined that the court's meaning of "must" in *Allen* was not the literal meaning but rather that the court intended it be read as merely a recommendation.

According to the court, prior to retirement, the legislature may alter the calculation formula thereby reducing the anticipated benefits as long as the modifications don't deprive an individual of a "reasonable pension." As a result of the decision, the lines determining what constitutes a reasonable pension have been blurred. This could allow employers to arbitrarily determine what is "reasonable." This could potentially open the door to a surge of litigation.

Marin Ass'n of Public employees v. Marin County Employees Retirement Ass'n, 2 Cal. App. 5th 674 (Cal. App. 2016)

New Jersey Supreme Court Holds COLA Not Constitutionally Protected.

In a 6-1 decision, the New Jersey Supreme Court upheld a freeze on COLA benefits under a 2011 law designed to assure full funding of the state retirement systems, several of which are within 10 years of insolvency. In 2015, the Supreme Court held the funding aspect of the law was not enforceable in the absence of a legislative appropriation, signed by the Governor. Despite the fact that the benefit to the employees (full funding) which was designed to offset the burden (COLA freeze and significantly increased employee contributions) was deemed unenforceable, the Court upheld both the COLA freeze and the increased contributions.

Berg v. Christie, 137 A.3d 1143 (N.J. 2016)

Change in Definition of Earnable Compensation Does not Unconstitutionally Impair Benefits.

Beginning in 1975, the Alabama ERS determined that earnable compensation could include overtime and subsistence allowances. The statute defining earnable compensation was silent on the precise elements. In 2011, the Board sought an opinion from the state attorney general as to whether such payments were authorized by statute and whether the longstanding policy was lawful. The AG opined that the payments were not authorized. As a result, the ERS stopped collecting contributions. In February 2012, a group of police officers and their association filed suit contending the change in policy was an unconstitutional impairment of contract as the 36 year policy had essentially formed a pension contract. During the pendency of the suit, in 2012, the state legislature amended the statute to make it clear that overtime and subsistence payments were not pensionable compensation. In rejecting the claims of employees, the Alabama Supreme Court found that the statute at issue did not unmistakably confer binding contracts which could not thereafter later be altered by the legislature on a prospective basis. The Court also noted that the inclusion of overtime and subsistence allowances was by Board policy which cannot bind the Legislature rather than by specific legislation.

Southern States PBA v. Bentley, 219 So. 3d 634 (Ala. 2016)

Removal by Police Officer of Disruptive Attendee Was Not Unconstitutional.

Tom Heaney was silenced and then ejected at a city council meeting in Gretna, Louisiana. He brought suit alleging that the presiding official at the meeting, Christopher Roberts, violated his rights under the First and Fourth Amendments of the Constitution as well as under the Louisiana state constitution. Heaney's suit also alleged that Ronald Black, the Gretna police officer who removed him from the meeting, violated those same Constitutional rights as well as state tort law. The District Court denied Roberts' motion for summary judgment on the First Amendment and state constitutional claims. The District Court also denied Black's motion for summary judgment on the state law battery and negligence claims. The District Court granted summary judgment on the free speech claims as to Black, the Fourth Amendment claims as to Black and Roberts, the punitive damages claim, and the false arrest claim. Roberts, Black, and Heaney all appealed. The Fifth Circuit dismisses Roberts' appeal on the First Amendment claim because there is a material fact issue as to whether there was viewpoint discrimination. It affirms, however, the District Court's denial of punitive damages, agreeing that there is no question that

Roberts' conduct did not rise to the level of reckless indifference or evil intent. The Court likewise affirms the District Court's grant of summary judgment in favor of Black on the First Amendment claim and the Fourth Amendment claim. The Court also upholds the District Court's grant of summary judgment in favor of Black on the false arrest claim, but dismisses Black's cross-appeal on Heaney's state tort claims for lack of jurisdiction.

Heaney v. Roberts, 147 F.Supp.3d 600 (5th Cir. 2017)

Illinois Village Fails to Show Good and Sufficient Cause for Failure to Meet Police and Fire Pension Contribution Obligations.

The Village of North Riverside, Illinois sought administrative review of a decision by the Department of Insurance that the Village violated the Pension Code by failing to make the full, actuarially designated annual contributions to its Police and Fire Pension Funds. In making this determination, the Director was able to consider unforeseeable or unexpected delays, an uncontrollable circumstance, or any evidence relating to Acts of God. While the Village showed evidence of the 2009 recession, an unexpected drop in sales and property tax, as well as a decrease in shared revenue from the State and rapidly falling credit, the Village made the decision to fully fund the Illinois Municipal Retirement Fund because that fund contained an enforcement provision. After considering all of the evidence, the hearing officer determined that the Village "had simply made choices to allocate funds elsewhere in derogation of its statutory duties." In addition, the hearing revealed that the Board had not only missed payments of recent years as they were initially charged with, but had made no annual contribution to the Funds six times between 2000 and 2011, and had made less than the full contribution in three of the other years. The majority of these violations occurred before the recession on which the Village supported their case. The administrative ruling and circuit court decision were affirmed.

Village of North Riverside v. Boron, 2016 IL App (1st) 152687

Senate Bill Making Changes to the Elected Officials' Retirement Plan Ruled Unconstitutional by the Arizona Supreme Court.

In 2011, the Arizona Legislature passed Senate Bill 1609 which made changes to the Elected Officials' Retirement Plan. The Bill changed the formula for calculating future benefit increases for retired members and increased the amount of contributions required for employed members. Both retired and employed members

of the Plan argued that the Bill violated the Pension Clause of the Arizona Constitution which provides, “public system retirement benefits shall not be diminished or impaired.” Additionally, employed members argued that the Legislature could not make unilateral changes to their benefits which vested at employment. The trial court granted summary judgment to the employed members on both counts but denied their request for attorney’s fees and prejudgment interest, and that the judgment should run against the State as well as the Plan. Upon transfer for the appeals court, the Arizona Supreme Court affirmed the unconstitutionality of the Bill, and granted fees and prejudgment interest, as well as ordering the judgment to run with the State and the Plan. The State moved for rehearing which was denied on March 8th.

Hall v. Elected Officials’ Retirement Plan, 241 Ariz. 33 (2016)

Illinois Court Rules Reduction to Health Care Benefits Was Not Unconstitutional.

City retirees appealed decision denying them preliminary injunctive relief after their health care benefits were reduced. In order to be granted a preliminary injunction, a party must show 1) an ascertainable right that needs protection, 2) that they will suffer irreparable harm without the protection, 3) That there is no adequate remedy at law, and 4) that there is likelihood of success on the merits. All of these elements must be proved by a preponderance of the evidence. The Illinois Constitution provides, “membership in any pension retirement system of the state...shall be an enforceable contractual relationships, the benefit of which shall no be diminished or impaired.” However, the Pension Code does not provide for those benefits. The benefits are created by contract or statute but the Legislature can place certain conditions on the benefits including time limitations. As the reduction included only “time-limited” health care benefits, the retirees do not have an ascertainable right that needs protection.

Underwood v. City of Chicago, 2016 IL App (1st) 153613 (2016)

Board’s Response to Recession May Have Breached Their Fiduciary Duty.

County employees brought action against their employee retirement association for breach of fiduciary duty and a violation of the County Employees Retirement Law (CERL), specifically in regards to a provision governing the computation of the normal contribution rate. As a result of the 2008 recession, The Stanislaus County

Employees' Retirement Association (StanCERA) implemented several changes to the actuarial calculations that are used to determine how to amortize unfunded liabilities within the system. Each party filed a motion for summary judgment, and the trial court concluded that none of the actions taken by the Board were unconstitutional and finding no material issue of fact, awarded summary judgment to StanCERA.

Faced with financial struggles, StanCERA decided to change the amortization schedule for unfunded liabilities to a 30-year level percent pay rather than the 20-year level dollar amortization initially proposed. In addition, the Board transferred approximately \$80 million from the non-valuation Health Insurance Reserve to the valuation reserves.

On appeal, the court determined that although the employees were not entitled to summary judgment, there were remaining issues of material fact. Ultimately, the court concluded that the trial court erred in granting summary judgment to StanCERA and the County. While many facts detailing the Board's conduct are not in dispute, "there remain material issues of fact whether the resulting conduct violated the constitutionally mandated fiduciary duty of loyalty the Board owed to StanCERA's members.

O'Neal v. Stanislaus County Employees' Retirement Association, 8 Cal.App.5th 1184 (2017)

ADMINISTRATIVE CASES

Kentucky Appeals Court Rejects Sovereign Immunity Claim by Retirement System.

Kentucky Retirement Systems was sued in a class action by a participating city claiming the Board engaged in various improprieties in the choice of alternative investments and in the payment of allegedly excessive management fees. The cities complained that KRS should not have purchased unregistered securities. The complaint sought a declaration that the Board had violated its fiduciary duty. In addition the suit sought to prohibit the use of KRS assets to pay the management fees and an accounting. The Board moved to dismiss on sovereign immunity grounds and a trial court denied the motion. On appeal, the Kentucky Court of Appeals held that sovereign immunity did not bar the suit because no monetary damages were sought. The court also found that the ability of KRS to sue and be

sued acted as a waiver of immunity for non-monetary damage suits. The order denying the motion to dismiss was affirmed and the case permitted to proceed.

Board of Trustees v. City of Fort Wright, 2016 WL 5319180 (Ky. App. 9/23/2016)

Texas Court Holds Delegation of Management to Pension Board Not Unconstitutional.

The City of Houston, faced with a burgeoning debt, challenged the constitutionality of the statute creating its Firefighter Retirement System. The City contended that delegating management to the board of trustees to, among other things, hire the actuary and adopt contribution rates and actuarial assumptions was not unconstitutional. The Court noted that the legislature had broad authority to establish retirement plans and to empower their management by boards of trustees, which were public and not private bodies. The Court noted that empowering the Board to retain an actuary and to act on the recommendations was not tantamount to control of the actuary nor was it a “rogue” operation. The Court found that the statutory regime governing that plan and all similar plans was reasonable and was not unconstitutionally vague.

City of Houston v. Houston Firefighters Relief and Retirement Fund, 502 S.W. 3d 469 (Tex. App. 2016)

Village Did Not Have A Due Process Right to Intervene in Police Pension Board’s Process for Reviewing Disability Application.

The Village of Vernon Hills filed a petition to intervene in the Pension Board’s disability application proceeding for Officer Briscoe. Briscoe, a watch commander, was injured while responding to a call of a home invasion in progress. The Officer injured his left knee and back and subsequently underwent surgery to repair both. After his injuries, Briscoe never returned to full duty. After Briscoe had submitted his application for a line-of-duty disability pension, the Village petitioned to intervene as they had a “significant financial interest” in the outcome. Briscoe voiced his concerns that interference from the Village could affect a fair application process. The Board denied the Village’s petition to intervene. After sending Briscoe to a number of independent medical examinations and hearing his testimony, the Board concluded that Briscoe’s injuries to his left knee and back caused him to become totally and permanently disabled. The Village filed an action seeking review of the Board’s decision. The trial court affirmed the Board’s ruling, stating, “Pension Boards were statutorily empowered to verify an applicant’s disability and right to receive benefits,

and the Board was ultimately responsible for administering the Fund and designating beneficiaries.” While the court noted that the Village did have a financial interest in the outcome of the hearing, the Village’s desire to turn the disability application process into an adversarial process directly contradicted the function of the Board’s hearing.

Village of Vernon Hills v. Vernon Hills Police Pension Fund, 2017 IL App (2d) 160308-U

City Had Authority to Change Size, Composition, and Manner of Election of Pension Board.

In 2013, the Police and Fire Unions of Milwaukee, Wisconsin appealed a circuit court order granting summary judgment to the City of Milwaukee regarding changes made to the size, composition, and manner of election of the pension board on a prospective basis. In their appeal, the Unions argued that they had a vested right in the size, composition, and manner of election of the pension board as it existed prior to 2013. On the other hand, the City argued that while the members may enjoy these privileges, they are certainly not vested rights and as a result can be taken away. Using the precedent established in *Stoker v. Milwaukee Country*, 359 Wis. 2d 347, the Court concluded that the City had a right to make those changes so long as the changes did not, “operate to diminish or impair the annuities, benefits or other rights of any person who is a member of [such benefit fund] prior to the effective date of any such changes.” In June 2017, the state Supreme Court agreed to review the matter

Milwaukee Police Association v. City of Milwaukee, 375 Wis. 2d 326 (Wis. App. 2017)

BENEFITS CASES

Washington Court Finds Service Disability Need Not be Based Solely on Work Related Injury But Upholds Factual Finding of Non-Duty Cause.

A firefighter in Washington state applied for a duty-related disability retirement based on mental illness. The firefighter had been abused as a child and suffered from depression and anger management issues. After 18 years on the job, he resigned and applied for service-connected disability retirement. He claimed that his disability arose from being wrongly accused (and later exonerated) of inappropriate contact with a minor patient; being wrongly accused (and later exonerated) of having an extra-marital affair while on duty; having a verbal altercation with hospital staff arising from a transport of an injured patient; and an additional on-the-job incident leading to his ultimate resignation. The employee argued that the enumerated incidents aggravated his childhood pre-existing condition. While agreeing that aggravation can be a basis for a service disability, the evidence in this particular case did not establish that the mental illness would not have arisen but for the job incidents. An award of non-duty disability was found to be based on competent and substantial evidence and the court declined the employee's invitation to re-weigh the evidence.

Shaw v. State Dept. Of Retirement Systems, 371 P.3d 106 (Wash. App. 2016)

Employee's Application to Enter DROP is Effective, Despite Corrections Made to the Form.

In February 2011, appellant attempted to enroll in the Ohio Police and Fire Pension Fund DROP program, by completing and submitting the required election form. The election form had been changed in multiple ways through the use of whiteout, to include correcting the designation of appellant's marital status from "single" to "divorced," to change the payment plan and to change beneficiary information. A letter was sent the next day to the appellant, in her former name, indicating the fund had received the election form, but that it was not accepted because the form was "incomplete." Appellant denied receiving the letter, which was addressed to her former name. On April 15, 2013, general counsel for OP&F sent a second letter to appellant further explaining why she was not enrolled in DROP. The letter stated the first election form was not "fully and properly completed" because it had been "altered." The next week the appellant completed and submitted a new election form to OP&F. The second election form also contained a correction using whiteout, which changed the appellant's marital status from "single" to "divorced." The fund

accepted the new election form and appellant was enrolled in the DROP program, effective the date of the second form.

The appellant appealed the OP&F's rejection of the first election form. The court first observed that the state retirement systems, including OP&F, are creatures of statute and can only act in strict accordance with their enabling schemes. Ohio statute requires the board to establish and administer a DROP and to adopt rules to implement the statutes governing DROP. Pursuant to the rules, to make an election to participate in DROP, an eligible member shall complete and submit a form prescribed by OP&F. The court reviewed the form and noted that the appellant used the form prescribed by the OP&F, but simply made corrections to it. The corrected form was legible and clearly indicated the appellant's intentions regarding enrollment in the DROP. The court held that the appellant followed the statute, and the regulations did not indicate that whiteout corrections were prohibited. Further, the court held that the fund's "zero tolerance" policy on corrections to the form was an abuse of discretion and reversed the Board's rejection of the DROP enrollment form, and directed the board to accept the form as filed in 2011. The case was later settled and the opinion was withdrawn on that basis.

State ex rel. Fitzgerald v. Ohio Police & Fire Pension Fund Bd. of Trustees, 53 N.E.3d 898 (Ohio App. 2015), 145 Ohio State 3d 1475 (2016)

CalPERS Enforcement of Airtime Limitation Upheld.

Professional firefighters employed by the State of California and their union sought relief on appeal against the California Public Employees' Retirement System (CalPERS) to compel it to continue the enforcement of a state law that allowed eligible public employees to purchase (at cost) up to five years of non-qualifying service credit ("airtime"). In an effort to "strengthen the state's public pension system and ensure its ongoing solvency" the Legislature enacted the Public Employees' Pension Reform Act of 2013 (PEPRA). Under this new legislation, employees would no longer have the option to purchase airtime but current eligible employees were given a 15-week opportunity in which to exercise their option to purchase before the deadline. Plaintiffs were eligible but did not purchase airtime before the deadline. The Court rejected the Plaintiffs' argument that the right to purchase up to five years of airtime service was a vested contractual right. In their reasoning, the Court points to legislative intent of the state law the firefighters wish to keep in place. "[A]irtime service credit was never intended by the Legislature to provide state employees a monetary advantage because it did not correspond to any service actually performed." The purchase of service was entirely cost neutral, and so while the

ability to purchase service was valuable to the recipient, the recipient, not the state, was paying for it. The State Supreme Court has agreed to review this case together with the *Marin County* decision on the scope of constitutional protection.

Cal Fire Local 2881 v. California Public Employees' Retirement System, 7 Cal. App. 5th 115 (Cal App. 2016)

Texas Appeals Court Curtails DROP Benefits.

A number of current and retired Dallas Police Officers sued the pension fund alleging that certain recent plan amendments violated the pension clause of the Texas Constitution. Specifically, the amendments called for the reduction of the future interest rate on DROP accounts for participants currently in the Plan, including those members already in DROP or whose accounts remained on deposit after separating from service. After a bench (non-jury) trial, the Court determined that the plan amendments did not violate the Texas Constitution. Looking to a case from the U.S. Court of Appeals for the 5th Circuit, the state appeals court ultimately concluded that benefit protections only extended to benefits actually earned by a vested member. Additionally, the protection does not extend to the calculation of benefits. With its decision, the Court “stayed true to Texas’ long-held flexible approach permitting municipalities to revise their pension plans in light of changing economic conditions.”

Eddington v. Dallas Police and Fire Pension System, 508 S.W. 3d 774 (Tex. App. 2016)

Florida Appeals Court Approves DROP Delay.

Four police officers employed by the City of Hollywood, Florida, as a result of their age, were eligible to enter DROP but wished to defer entry to maximize their monthly retirement benefit. Before entry, in an effort to improve financial problems, the City passed an ordinance that imposed a deadline for entry into the program. The officers brought suit alleging a violation of their contract rights and a taking of private property without just compensation. The trial court ruled in favor of the officers. On appeal, the Appeals Court had to determine whether the officers had a vested interest in delayed entry into DROP and if so, whether the City had a compelling interest in amending the plan. With guidance from a 2013 Florida Supreme Court case which lowered benefits in the Florida Retirement System, the court found, “a prospective change to retirement benefits does not operate as an impairment of a contract or an unconstitutional taking.” The Court reasoned that the ordinance,

“permitted officers already eligible to enter DROP to do so and to enjoy the full benefits of DROP, albeit with an imposed deadline for entry.” The Appellate Court reversed and remanded to the trial court to determine whether, under the terms of the DROP plan, the officers’ DROP application permits them to enter as of the deadline, withdraw their applications or whether their attempt at entry after the deadline renders their applications void.

City of Hollywood, Florida v. Lyle Bien, Norris Redding, Derrick Austin, and Mark Ruggles, 209 So. 3d 1 (Fla. 4th DCA 2016)

Florida Appeals Court Refuses Declaratory Judgment On Contributions.

A former city employee sought declaratory action against the City of Jacksonville by asking for a declaration from the court that the term “contributions” as used in the City Code referred to both contributions made by her as well as those made by the City. Samantha Helfrich left the City of Jacksonville with just over five years of service and had contributed approximately \$15,666 to her deferred retirement fund. The Plan also calls for the City to make periodic contributions to the Fund. Since Helfrich had not yet reached the designated retirement age of 65, she was given the choice to vest for deferred retirement and leave her contributions in the fund, or she could rescind her vested rights and receive a refund of her contributions. According to the rules and regulations adopted by the Fund, “the election must be made on the prescribed form.” Helfrich made an oral request to the Board that she would like to receive both her contributions as well as the City’s. The Board informed her she was not entitled to the City contributions. Following a grant of summary judgment for the City, Helfrich appealed. The appellate court concluded the trial court was “eminently correct” in holding that Helfrich’s request for the declaratory judgment was, “nothing more than a hypothetical question raised to assist her in deciding which election to make under the Plan, and did not state a ‘definite and concrete assertion of right.’”

Helfrich v. City of Jacksonville, 204 So.3d 39 (Fla. 1st DCA, October 4, 2016)

Incentive Pay Not Included in Annual Compensation for Retirement.

Kentucky Public School employee appealed the decision by the Franklin Circuit Court which affirmed the Kentucky Teacher’s Retirement Systems’ (KTRS) determination that annual incentive pay was excluded from annual compensation in determining pension benefits. Smith worked for the Kentucky Educational Development Corporation (KEDC) for 28 years. Beginning in 1997, Smith became

eligible for incentive pay at the discretion of the Executive Director. Between 1997 and 2002, Smith received bonuses totaling \$206,401.30, and from that amount he contributed \$20,408.42 to KTRS. Kentucky Statute 161.220(10) provides, "Annual compensation shall not include payment for any benefit or salary adjustment made by the public board, institution, or agency to the member or on behalf of the member which is not available as a benefit or salary adjustment to other members employed by that public board, institution, or agency..." As such, KTRS informed Smith that he would be refunded the full amount of \$20,408.42. The appeals court affirmed the decision of the lower court.

Smith v. Teachers' Retirement System of Kentucky, 515 S.W. 3d 672 (Ky App., 2017)

Unused Vacation Days Not Considered a Contractual Benefit.

A group of employees who are participants in the Illinois Municipal Retirement Fund sued the City of Springfield after it passed an amendment that repealed the opportunity to cash in unused vacations days before retirement. The ordinance was passed on July 21, 2015 in an effort to curb pension spiking. On August 19, 2015, the Fund Director sent a letter to all future retirees informing them of the change and that the opportunity to pension spike by cashing in unused vacation days would end on May 31, 2016. The plaintiffs were a class of individuals who were not yet ready to retire but didn't want to lose out on this opportunity. The parties filed cross-motions for summary judgment and the defendant's motion was granted. Plaintiffs appealed the decision arguing that this ordinance violates the pension protection clause. In affirming the decision of the trial court, the Appeals Court reasoned that the vacation buyback provision was not a benefit of membership in the Fund, but rather a benefit of being employed by the defendant. The change was made to the terms and conditions of employment, not to the Pension Code. This change only resulted in an indirect and incidental effect on the amount of retirement benefits and therefore did not violate the pension protection clause.

Pisani v. City of Springfield, 2017 IL App (4th) 160417

Civil Employee No Longer Sworn Doesn't Qualify as Firefighter Under the Pension Code.

Former Fire Chief, Cronholm, retired from service on October 31, 2009. On November 1, 2009, Cronholm began employment as a chief administrator, a newly created position. The Fire District was advised by counsel that hiring Cronholm in this position would not constitute reentry into active service. Regardless, the Board of Trustees requested an advisory opinion from its regulator, the Illinois Department of Insurance (DOI). The DOI responded that the job of chief administrator and fire chief were substantially similar and would result in reentry into service. As a result, the Board created a new job description, administrator, and hired a new fire chief.

A group of Firefighters who participated in the Pension Fund filed a declaratory judgment action alleging that the Board breached its fiduciary duties by determining that Cronholm did not reenter active service. The Board conducted an evidentiary hearing on remand to determine whether or not Cronholm had reentered service under the Pension Code. Despite evidence that Cronholm no longer had an emergency rescue vehicle, no longer contributed to the Pension Fund, and no longer responded or investigated fires or code enforcement, the Board determined that Cronholm had reentered service from November 1, 2009 to March 18, 2010, the date the new fire chief was hired. The Board ordered a \$1,000 per month deduction from Cronholm's pension benefits until the amount was repaid. Cronholm filed a complaint and the circuit court concluded that the Board's decision was clearly erroneous. This appeal followed. In affirming that trial court's decision, the Court determined that the definition of firefighter under the pension code was "specifically to define firefighters as those whose duty it is to participate in the work of controlling and extinguishing fires at the location of any such fires." Because Cronholm was no longer controlling or extinguishing fires at their location, he was not doing the work of a firefighter, and therefore was not considered to have reentered active service.

Cronholm v. Board of Trustees of Lockport Fire Protection District Firefighters' Pension Fund, 2016 IL App (3d) 150122

Wife's Disability Retirement Subject to Community Partition.

Diana and Michael Morgan were married from November 1980 to June 1999. From 1995 to 2001, Diana was on disability retirement from the Teacher's Retirement System of Louisiana (TRSL). Diana returned to active service from 2001 to 2011 when she finally retired. Once she officially retired from teaching, Diana began

receiving retirement benefits instead of disability benefits. Diana was disabled at the time of her retirement and as a result received a larger retirement benefit than she would have if she were not disabled. As such, a portion of her retirement benefit was based on her disability. Despite Diana's arguments, the court, in following the precedents established in *Anzalone v. Anzalone* and *Sims v. Sims*, ultimately held that Diana's ex-husband, Michael Morgan, was entitled to a receive the "proportion of... [benefits] recognized as attributable to the other spouses's employment during the existence of the community," regardless of the fact that some of the benefit was attributed to her disability.

Morgan v. Morgan, 212 So. 3d 1235 (La. App. 1 Cir. 2017)

Heart-Lung Presumption Overturned With Competent Medical Evidence.

After applying for a job as a correctional officer trainee, Andrew Junod underwent a pre-hire medical history questionnaire. Mr. Junod denied ever having been diagnosed with vascular disorders, high blood pressure, heart disease, heart murmur or obesity, however he did disclose that he had a family history of heart disease or heart attack. His questionnaire did not indicate his blood pressure and included no information about cholesterol levels. Regardless, the physician checked the boxes indicating that his examination did not reveal evidence of tuberculosis, heart disease or hypertension.

Just over three months after becoming certified, Junod suffered a heart attack while asleep at home. The Captain asked if the heart attack was work related and Junod answered that it was not. He did not file a claim for benefits, and returned to work a few weeks later. In December 2011, Junod left the correctional facility but was rehired approximately one year later. In December 2014, Junod first made a claim for benefits arising out of his heart attack, claiming he did not become aware of the "heart-lung" statute until then, and so his claim was timely.

Mr. Junod's independent medical examiner acknowledged his non-occupational risk factors but determined he was unable to determine the cause of the heart attack. The Employer's doctor concluded that Mr. Junod had developed atherosclerosis over a period of years prior to his employment as a result of Junod's multiple risk factors. As a result, the doctor concluded that it was not Junod's employment that caused his heart attack. Because of the differing opinions, the parties hired an expert medical advisor (EMA). The EMA opined that despite several coronary risk factors, Junod's heart attack was work related. However, the EMA did not support his position with sufficient facts or data.

In order to rebut the presumption granted in the heart-lung statute, the presumption must be rebutted with competent medical evidence. Ultimately, the court determined that Mr. Jurod's Employer successfully rebutted this presumption. Mr. Jurod's significant risk factors coupled with his relatively short time on the job and insufficient evidence of causation allowed the court to determine the presumption could be overturned.

State Department of Corrections v. Junod, 217 So. 3d 200 (Fla. 1st DCA 2017)

Employer Failed to Rebut Heart-Lung Statute Presumption.

In this workers' compensation appeal, the Employer challenges an order awarding Robert Ratliff, a firefighter, entitlement to compensation for his heart condition and related medical treatment under the "heart-lung" statute. Ratliff was a firefighter for twenty six years. In November 2014, Mr. Ratliff attended a stressful meeting in which disagreements arose. During the meeting he began to experience chest pain and discomfort and was admitted to the hospital after the meeting. Mr. Ratliff was diagnosed with coronary artery disease (CAD) and acute interior wall myocardial infarction. Having no evidence of heart disease on his pre-employment physical, Ratliff qualified for the presumption.

Mr. Ratliff asserted compensability of his heart condition on a "presumption only" basis, as he had no medical evidence of causation. Both Mr. Ratliff's independent medical examination cardiologist and his Employer's noted a pre-existing history of diabetes, high cholesterol, prior history of smoking and a family history of early onset CAD. However, both doctors opined that the stressful meeting could have "triggered" the heart episode.

The Major Contributing Cause (MCC) analysis is necessary when the claimant's injury or need for treatment is caused by the impact of the employment accident combining with a preexisting injury or condition that is non-work related. In order to be successful in rebutting the presumption, the Employer would need to provide medical evidence that "the" or "all" contribution factors are non-employment related. While both IME doctors concluded they could not pinpoint the exact triggering event, both opined that the stress from the business meeting could have been one of many potential causes. As a result, the Employer failed to meet its burden and the presumption is upheld.

City of Jacksonville v. Ratliff, 217 So. 3d 183 (Fla. 1st DCA 2017)

DISABILITY CASES

Medical Board Fails to Rebut Heart/Stroke Bill Presumption.

Officer Kersellius was finishing her shift when she heard a radio call for a murder suspect at large. Kersellius volunteered to investigate with a partner. When exiting the vehicle, Kersellius grabbed her neck and felt light headed. After being rushed to the hospital, she was diagnosed with a ruptured aneurysm and brain hemorrhage. Kersellius applied for and was denied an accident disability retirement. While the Medical Board found she was disabled from performing her full duties, it concluded that the officer's injury was a congenital abnormality, which spontaneously ruptured. The Court determined that the Medical Board's conclusion that the aneurysm ruptured spontaneously was not supported by any credible source but was instead based on speculation. As a result, the Board was unable to rebut the presumption granted under the Heart/Stroke Bill that the injury was stress or job related.

Kersellius v. Bratton, 35 Misc. 3d 1017 (N.Y. App. 2016)

Injuries Sustained Thirty Minutes Before Duty Not Considered "In-Service."

Court determined that injuries sustained by an employee in the MTA Police parking lot thirty minutes before service was to begin did not qualify as "in-service." The Court distinguished this incident from that discussed in *Matter of De Zago v. New York State Police & Fireman's Retirement Sys.*, 157 A.D.2d 957 (3rd Dept. 1990). In that case, the officer was injured fifteen minutes before duty, while wearing his uniform. The officer was found to be performing the duties of a police officer pursuant to the longstanding procedure of the officer's department that required officers to report to work fifteen to thirty minutes prior beginning tours of duty.

Rubenstein v. Metropolitan Transportation Authority, 145 A.D.3d 453 (1st Dept. 2016)

Board of Trustees has Sole Authority to Determine Weight and Credibility of Applicant's Evidence.

Donna Bartrum appealed a decision by the Franklin Circuit Court that affirmed the final order of the Board of Trustees of the Kentucky Retirement System denying her application for disability retirement benefits. Bartrum had just over 19 years of service with the Board of Education working as a Family Resources Director. In

2012, Bartrum submitted her application for disability retirement benefits based on depression, OCD, fibromyalgia, chronic fatigue syndrome, and chronic pain. Bartrum alleged that she was “unable to stay awake, unable to stay alert, unable to maintain focus...unable to manage work-related stress...” The Medical Board ordered her to undergo an independent psychological examination. The doctor who conducted the examination was weary of Bartrum and expressed his concern that she was exaggerating symptoms. Based on his report, the Medical Board denied the disability application. Bartrum requested an administrative hearing, in which the hearing officer recommended denial as Bartrum had not met her burden of proof that she suffered from a permanent disability due to psychiatric issues. A formal complaint followed, in which the court found no error by the Board. The Court, in affirming Franklin Circuit Court’s decision, determined that Bartrum had not presented evidence to compel the Board to grant her a disability retirement. The Court reasoned, “The Board of Trustees had the sole authority to determine the weight and credibility of Bartrum’s evidence.” The Board did not err in their decision to reject Bartrum’s application.

Bartrum v. Kentucky Retirement Systems, 2017 WL 242674 (Ky. App. 2017)

Hostage Negotiator Suffering From PTSD Awarded Accidental Disability Retirement Benefits.

Board of Trustees determined detective and hostage negotiator, Gerardo Martinez, was not entitled to accidental disability retirement benefits after witnessing the fatal shooting and display of the corpse of a suspect with whom Martinez had negotiated for 12 hours during a crisis situation. The Board concluded that the incident was not “undesigned and unexpected” for someone trained to handle hostage situations. At Martinez’s request, a hearing was held before an Administrative Law Judge who recommended accidental disability benefits based upon the testimony of Martinez’s expert witness. The witness had experienced over 3,500 hostage incidents and explained how a reasonable person would suffer a disabling mental condition as a result of this incident. The Board rejected the ALJ’s recommendation, and this appeal followed. Ultimately, the Court determined the Board erred in their decision not to award accidental disability benefits. Martinez had formed a bond with the suspect after negotiating with him for 12 hours and was not informed by SWAT team members before they entered the suspect’s home. The witnessing of such a traumatic event satisfied the undesigned and unexpected criteria. The Board’s argument that training could have prepared Martinez for this specific situation was not supported by the record.

Martinez v. Board of Trustees, Police and Firemen’s Retirement System, 2016 WL 7233999 (N.J. Super. 2016)

Aggravation of Pre-Existing Condition Results in Non-Duty Disability.

A Baltimore City firefighter was ascending a spiral staircase in the firehouse and hit his head on the top landing. He was treated medically for blurred vision, nausea and neck stiffness. The firefighter suffered from degenerative disc disease which was aggravated by the injury. Ultimately, it was determined that the firefighter was disabled from further fire service. The medical board unanimously determined that the disability was the result of disc degeneration, aggravated by the head contusion. As a result the pension board granted a non-line of duty disability. A trial court reversed. On appeal, the Maryland Court of Special Appeals found that its sole function was to determine if the retirement board decision was based on competent and substantial evidence. Given the unanimous conclusion of the medical board that the disability was the result of disc degeneration, the non-duty disability was affirmed.

Fire & Police Employees' Retirement System v. Green, 2016 WL 4076419 (Md. App. 7/29/2016)

FORFEITURE CASES

Florida Board of Trustees Unable To Secure Forfeiture Despite Guilty Pleas.

Despite guilty pleas to numerous specified offenses, the Board of Trustees of the City of Tampa's General Employment Fund was unable to successfully prove all of the elements required to institute forfeiture against a member of the Plan. Demetrio Rivera was informed that the Board would be entering an order terminating and forfeiting all of his accrued benefits in accordance with § 112.3137, Florida Statutes. Rivera challenged the proposed order and an evidentiary hearing was held. The Board concluded that Rivera had committed certain specified offenses during his employment with the City and that the offenses in question were committed "through the use the use or attempted use of power, rights, privileges, duties or public employment position..." Rivera appealed. In order for the Board to institute a forfeiture against Rivera, they must prove the following: 1) Mr. Rivera was a public officer or employee, 2) Mr. Rivera had committed either a felony defined in section 800.04 against a victim younger than 16 or any felony defined in chapter 794 against a victim younger than 18, 3) the offense or offenses were committed after October 1, 2008, and 4) Mr. Rivera committed the offenses in question through the use or attempted use of power, rights, duties or position of his public employment position. The court determined that the Board easily proved the first 3 requirements, but

struggled to establish a “nexus” between the offenses committed and Rivera’s position as a City employee. Rivera argued that the Board failed to provide any proof other than inadmissible hearsay, which in itself is not sufficient to provide a finding. Although it was established that Rivera was arrested on City property with an underage female, there was no actual evidence that he used his City issued keys to gain access. The forfeiture was not supported by “competent, substantial evidence” and as a result, must be set aside.

Rivera v. Board of Trustees of the City of Tampa’s General Employment Retirement Fund, 189 So.3d 207 (Fla. 2nd DCA, February 26, 2016)

Judge Forfeits Pension After Retirement.

A Magisterial District Judge retired with over 38 years of service, including military time. Subsequent to his retirement, Judge Miller was asked and agreed to serve as a Senior Magisterial District Judge. Pursuant to the Pennsylvania Rules of Judicial Administration, once Miller’s application was approved with the Administrative Office he would be eligible for assignment. Miller sat on the Philadelphia traffic court for 177 days between 2006 - 2008 and was paid per diem for his work. Miller continued to be appointed from 2009-2012. In December 2011, while at the Lima Regional Court conducting business associated with his position with the Delaware County District Justice Association, a Court Clerk asked Miller if he knew anyone that could assist her with her son’s traffic citation. Miller sent the citation and a note reading “please advise” to the Director of Courtroom Operations. The Director informed Miller that the citation would be cancelled and that the Clerk’s son did not have to appear because “it was dismissed.”

On January 31, 2013, the U.S. Attorney’s Office filed a Criminal Information against Miller charging him with one count of mail fraud and aiding and abetting. The Information alleged that Miller had exerted extrajudicial influence over the handling of the traffic citation. Miller pled guilty to one count of voter fraud in February of 2013 and thereafter received a letter from the State Employees Retirement System (SERS) notifying him that his pension would be forfeited and he would receive a refund of his contributions. Miller appealed the Board’s decision and a hearing was held in 2014. In 2015, the hearing officer denied Miller’s appeal and affirmed the forfeiture. The order was adopted by the Board and this appeal followed. Miller argued that because he was not a judge or public official at the time of his misconduct and guilty plea, his pension should not have been forfeited under Act 140. The court, in affirming the forfeiture, argued, “Each Supreme Court appointment of Miller assigning him as a Senior Magisterial District Judge was a renewal of the agreement to perform the term of public service without violating Act 140; an

agreement which encompasses all that has gone before it.” Because Miller’s assignments continued until December 31, 2012, he was considered a judge and public official at the time of his misconduct.

Miller v. State Employees Retirement System, 137 A.3d 674 (Pennsylvania, 2016)

Police Officer Removed for Misconduct Forfeits Pension.

Officer Oliveira appealed a final agency decision by the Board of Trustees denying him his deferred retirement benefits based upon a finding that he was previously removed from his employment for misconduct and delinquency. In 2001, the City of Newark Police Department issued six disciplinary charges against Oliveira including misconduct, false statements, and failure to maintain residency in the state which was required for employment. Oliveira accepted a “plea agreement” which required him to obtain permanent residency in the State within six months. In addition, the agreement called for a six month suspension that would be held in abeyance unless Oliveira committed an infraction that resulted in “major discipline.”

A follow up investigation proved that the officer had not complied with the terms of his plea agreement, including failure to move his residence to the State. Oliveira was subsequently terminated. In April 2014, Oliveira applied for and was denied benefits from the Police and Firemen’s Retirement System (PFRS). Upon reconsideration, PFRS issued a final order stating that the statutes and regulations prohibited Oliveira from receiving pension benefits. Oliveira appealed, arguing, among others, that his termination was based on his residency which does not “touch and concern” the duties of a police officer. In affirming the Board’s decision, the Court held that Oliveira had previously admitted to committing misconduct through the use of false statements. Additionally, Oliveira was given a chance to avoid more serious sanctions by simply complying with the terms of his plea. Oliveira was terminated for cause and as a result will forfeit his pension.

Oliveira v. Board of Trustees, Police and Firemen’s Retirement System, 2016 WL 4379387 (N.J. Super., 2016)

Board’s Decision to Implement Full Forfeiture Was Found Disproportionate to Officer Misconduct.

Officer Susan Hollander appealed the decision of the Board of Trustees that she must forfeit her entire pension benefit due to dishonorable service. Hollander worked for a women’s correctional facility for 25 years with a spotless record. Hollander’s retirement application was initially approved in 2009, however a month later the DOC

opened an investigation after an inmate was found with a cell phone. The inmate reported that Hollander gave her the phone, and in addition, provided her with beauty products not available at commissary and two money orders totaling \$250. In exchange for pleading guilty to third-degree providing a communications device to a confined person, the other charges against her were dropped. In March 2011, Hollander was sentenced to three years in prison, which was commuted to nine months, of which Hollander served four months. In October 2011, the Board determined that Hollander must forfeit her entire pension. Hollander requested a fair hearing which was conducted by an Administrative Law Judge.

Hollander expressed remorse for her lack of judgment and testified that she suffered from depression during the time of her misconduct. The ALJ reasoned that Hollander had served for 25 years without incident as so the forfeiture of her entire pension was unfair. The ALJ recommended a three year forfeiture. Ultimately the Board rejected the ALJ's recommendation and called for a full forfeiture. This appeal followed. The Appeals Court, in reinstating the ALJ's recommendation, determined that the Board lacked support in their decision. Hollander's misconduct, while inappropriate, did not rise to a level that warranted a full forfeiture.

Hollander v. Board of Trustees of Police and Firemen's Retirement System, 2015 WL 11017909 (N.J. Super. 2016)

Former Speaker of the House Forfeits Pension For Conviction of Obstruction of Justice.

Former Speaker of the House, Thomas M. Finneran appealed the decision by the State Retirement Board that his pension was required to be forfeited as a result of his conviction for obstruction of justice. In 2007, Finneran pleaded guilty to one count of obstruction of justice in connection with false testimony he gave in a Federal court action challenging the 2001 redistricting act. Shortly after entering a guilty plea, the Board ceased payments for Finneran's pension on the grounds that he had been convicted of a criminal offense involving a violation of the laws applicable to his position or office. Finneran argued that his pension should not be forfeited because there was no link between his conviction and his duties as Speaker of the House. Ultimately, the court concluded, "While Finneran's offense itself does not directly implicate his duties as Speaker of the House, it is nonetheless inextricably intertwined with his position. Simply put, it is only because he had been Speaker of the House at the relevant time that he was in a position to testify as to the genesis of the redistricting plan and to do so falsely"

State Board of Retirement v. Finneran, 476 Mass. 714 (2017)

RECENT FEDERAL DECISIONS OF INTEREST

Federal Appeals Court Takes Narrow View of Constitutional Protection.

A divided federal appeals court, hypothesizing how the Supreme Court of Texas would interpret the state constitutional provision on pensions, determined that the 2003 amendment to the State Constitution (Art. XVI, Sec.66) was intended only to protect benefits earned up to the date of a statutory amendment, but did not extend prospectively. While the Court accepted the members' contention that vested rights included the formula by which benefits were calculated, it declined to extend that holding to future accruals after the statutory amendment.

Despite an earlier opinion by the Texas Attorney General supporting the employees, the federal court determined that, if it had been asked, the Texas Supreme Court would have ruled as the federal court did. The employees have asked the federal court to refer the question of Texas law to the Texas Supreme Court and the federal court declined by a 2-1 vote. The dissenting judge pointed to cases from New York, California and Alaska all of which were relied upon by the Texas Attorney General in his opinion and would have favored the interpretation of the members.

The case is pending review in the U.S. Supreme Court.

Van Houten v. City of Ft. Worth, 827 F. 3d 530 (5th Cir. 2016)

Federal Appeals Court Finds COLA Not Constitutionally Protected.

The U.S. Court of Appeals for the 6th Circuit upheld an emergency statute in Kentucky to freeze and reduce the COLA until a certain funding level was reached. A group of retirees challenged the act claiming it impaired their contractual rights to the COLA in effect at the time of retirement. The Court, in rejecting the retirees' claims found that the COLA statute did not "unmistakably" constitute a contract. Looking to cases in other states, the federal court found that the COLA was an "unmistakable" part of the base benefit and therefore subject to prospective reduction.

Puckett v. Lexington-Fayette Urban County Gov't., 2016 WL 4269802 (8/15/2016)

Federal Appeals Court Finds Federal Forfeiture Law Preempts State Constitution.

A former New York State Assembly member was convicted of bribery, extortion, conspiracy to commit theft of honest services and wire fraud. As part of the penalty, the defendant's benefits in the state retirement system were forfeited as part of his restitution. The defendant argued that the contractual right to retirement in the New York State Constitution prohibited the forfeiture. The U.S. Court of Appeals for the Second Circuit held that the Supremacy Clause of the U.S. Constitution took precedence over a state constitutional provisions and upheld the forfeiture.

U.S. v. Stevenson, 834 F. 3d 80 (2d Cir. 2016)

IF YOU HAVE ANY QUESTIONS OR COMMENTS CONCERNING THIS PRESENTATION, CONTACT KLAUSNER, KAUFMAN, JENSEN & LEVINSON, 7080 NW 4th STREET, PLANTATION, FLORIDA 33317, (954) 916-1202, FAX (954) 916-1232, WEBSITE, www.robertdklausner.com.