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NATIONAL CASE LAW UPDATE

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United States Supreme Court Rules Kentucky Retirement Systems' Use of Age is Not Discriminatory.

Defying conventional prognostication, in a 5-4 decision, the Supreme Court held on June 19 that the Kentucky Retirement Systems' disability retirement program designed to provide all plan members with a normal retirement "safety net" does not violate the Age Discrimination in Employment Act (ADEA).

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Overruling an en banc (14 judge) panel of the 6th Circuit Court of Appeals, the Supreme Court recognized that Kentucky's disability benefit is based on "pension status," which is "analytically distinct" from *prima facie* (on its face) discrimination on the basis of age. The Court concluded that Kentucky's use of normal retirement age as a criterion in connection with disability benefits did not constitute intentional discrimination against older workers. Rather, the Court acknowledged that it was dealing with "a quite special case of differential treatment based on *pension status*, where pension status — with the explicit blessing of the ADEA—itself turns, in part, on age."

In so holding the Court adopted the following common sense, functional rule: in order to state a disparate treatment claim under the ADEA, the EEOC (or private plaintiff) must establish that the differential treatment was "actually motivated" by age, not simply pension status. In other words, the plaintiff must prove that any differential treatment based on pension status is in fact discrimination "because of" age.

While it is true that the Kentucky Retirement System uses age as an explicit factor in calculating disability benefits for at least some workers, and treats employees differently based on pension status, this design should not be confused with intentional discrimination on the basis of age. Accordingly, it is not facially discriminatory under the ADEA when the purpose of the disability benefit is to provide disabled public safety officers with the amount of benefit they would have been entitled to had they worked until normal retirement.

Background About the Kentucky Plan and Plaintiff Lickteig's Discrimination Claim

Kentucky, not unlike almost every state in the country, has a defined-benefit pension plan designed to attract and retain qualified public sector employees. Public safety members in Kentucky can qualify for normal retirement by either (1) completing 20 years of service or (2) reaching age 55 with five years of service. Although many states impose a mandatory retirement age, Kentucky does not. If an employee becomes disabled before reaching either milestone, Kentucky provides a disability retirement safety net. In structuring its benefits, Kentucky made a decision not to provide *disability* retirement benefits to an employee who is already eligible for *normal* retirement by virtue of having reached either the service-based *or* age-based milestone. Long ago, Kentucky decided not to give a safety net to an employee who does not need one.

At the time of application for disability, if a member satisfies the plan's disability eligibility requirements, the Kentucky system awards benefits based in part on how close a disabled worker is to reaching normal retirement. If a member becomes disabled prior to retirement, the plan imputes years of service needed to get a member to the earliest normal retirement date, but not more than double the years of actual service. If a member is otherwise eligible for an unreduced normal retirement based on years of service or a combination of years of service and age, disability benefits are no longer needed, and no longer available.

On the facts of the case, Charles Lickteig became eligible for normal retirement at age 55. He continued to work and subsequently became disabled at age 61. Because his disability arose after he was already eligible for normal retirement, the Kentucky plan does not provide any additional disability benefit and does impute any additional years of service credit. Mr Lickteig complained of age discrimination. The EEOC filed suit on his behalf against the Kentucky Retirement System, the Commonwealth of Kentucky, and the Jefferson County Sheriff's Department.

Trajectory of the Case to the Supreme Court

The District Court granted summary judgment for the defendants, finding that the EEOC did not establish a prima facie case of disparate treatment without any evidence of discriminatory intent. A three-judge panel of the Sixth Circuit Court of Appeals affirmed. The EEOC was granted rehearing en banc by the entire Sixth Circuit, which reversed. See *E.E.O.C. v. Jefferson County Sheriff's Dept., et al*, 467 F.3d 571, 573 (6th Cir. 2006). Reasoning that the Kentucky system was facially discriminatory on the basis of age, the full Sixth Circuit determined that the EEOC was not required to provide additional proof of actual discriminatory intent to establish its prima facie case.

In granting Kentucky's request for certiorari, the U.S. Supreme Court considered the "potentially serious impact" of the decision upon public retirement systems around the country. The Court specifically cited the Amicus Curiae (friends of the court) briefs, particularly the one filed by NCPERS, which predicted a large increase in pension

liabilities and potential reduction in benefits for future disability retirees as a primary reason for taking the case.¹

At oral argument the EEOC, represented by the U.S. Solicitor General's Office, argued that in calculating benefits for disability retirees, "Kentucky uses age as an explicit decision-making factor in a way that disadvantages older workers." Kentucky, which we had the privilege of representing through every step of the litigation, responded that retirement eligibility is based on 20 years of service or age 55, and that all retirement plans necessarily make distinctions based on age. Because age is a necessary component of any retirement plan, Kentucky argued that only plans that use age in an arbitrary manner are discriminating on the basis of age. "Age is not the only determinant. And 'age' is not a bad word." (A transcript of the oral argument is available at our website, www.robertdklausner.com.) Furthermore, Kentucky argued that the plan is not facially discriminatory because it differentiates on the basis of retirement eligibility, not age. The EEOC replied that the plan is facially discriminatory because it uses age as a factor to the disadvantage of older workers.

Holding and Six Components of Majority Opinion's Rationale

In a decision which illustrates that pension matters transcend traditional alignments of judges and philosophies within the Court, Justice Breyer's majority opinion was joined by Chief Justice Roberts, Justices Stevens, Souter and Thomas. In an unusual pairing of views, Justice Kennedy wrote a dissenting opinion joined by Justices Scalia, Ginsberg, and Alito. Justice Breyer's opinion was grounded on six principal arguments which are uncharacteristic in their unabashed logical reasoning, policy concerns, as well as more conventional legal and statutory analysis.

¹ In a dramatic and not unappreciated pooling of resources in support of the Kentucky Retirement Systems, the following entities submitted amicus curiae briefs: the National Conference on Public Employee Retirement Systems, the National Association of State Retirement Administrators, the National Council on Teacher Retirement, the National Association of Counties, the Council of State Governments, the National League of Cities, the International Municipal Lawyers Association, the National School Boards Association; as well as the states of Michigan, Alaska, Arkansas, Colorado, Delaware, Idaho, Maryland, Minnesota, New Mexico, Oklahoma, South Carolina, Tennessee and Texas. Among other things, the amicus curiae briefs warned that many states and systems would have to modify their plans in order to comply with a contrary decision.

First, the Breyer majority opinion began by recognizing that age and pension status are analytically distinct concepts. Second, the Court observed that on the facts of the case, pension status was not being used as a proxy for age. Instead, the identical disability benefit is offered to all hazardous duty members at the time of hire, should they become disabled before eligibility for normal retirement. As a matter of statutory construction, the Court observed that the ADEA treats pension more flexibly and leniently than wages. The Court also provided context by stating that it was not evaluating an individual employment decision, but rather a complex set of statewide retirement provisions. With this in mind, the Court acknowledged that Congress has approved similar programs for federal employees as well as under the Social Security Disability Insurance program. Accordingly, Congress has itself permitted disability benefits to be calculated using a formula that expressly takes age into account, or otherwise imputes years of service to workers younger than age 60.

Third, the Court determined that Kentucky was able to supply a legitimate non-age-related rationale for its treatment of older workers: namely a benefit intended to track Kentucky's normal retirement safety net. Age factors into the calculation only because normal retirement itself permissibly includes age as a consideration. According to the Court, any disparity "turns on pension eligibility and nothing more." Fourth, the Court noted that Kentucky's plan design worked to the advantage of older workers in certain circumstances. For example, a 45 year old worker with 10 years of service will receive more imputed service than a 40 year old with 15 years of service. Such examples confirm that Kentucky's underlying motive is not discrimination on the basis of age. Fifth, the Court reasoned that the Kentucky system does not rely on any of the stereotypical assumptions that the ADEA sought to eradicate. To the contrary, the plan is consistent in assuming that disabled workers would have worked to the point at which they would have become eligible for a pension.

Lastly, the Court was conscious of the unintended consequences of a contrary result. The Court observed that future disabled employees would not be well served if Kentucky was forced to severely cut benefits. According to the Court, the difficulty of finding a suitable remedy that would preserve Kentucky's legitimate objectives further suggests that the case did not involve intentional discrimination on the basis of age.

Based on the Court's holding, the law has been clarified regarding the evidence needed to establish a disparate treatment (intentional discrimination) ADEA claim. Unlike facially discriminatory classifications on the basis of sex or race, pension

status will not be treated as establishing a prima facie case without further examination of the underlying motive. In pension cases, the plaintiff must prove that any differential treatment was arbitrary and "actually motivated" by age.

Justice Kennedy's dissent applied a more mechanical statutory application of the ADEA, concerned that the majority was undercutting the basic framework and protections of the ADEA.

It was a rare privilege to be able to argue a case of such significance to the public pension community and to be able to achieve a result which effectively preserves benefit structures in hundreds of public plans. For Kentucky, this result ends 10 years of litigation and saves the System approximately \$70 million.

Friend of the Court Brief Filed by National Conference on Public Employee Retirement Systems in *Lexin v. Superior Court*.

The lower court rulings in the *Lexin* case have resulted in trustees walking out of board meetings and drawing straws rather than making the discretionary, fiduciary decisions needed to effectuate the management of public retirement plans. The fear of prosecution based on an after-the-fact Monday morning quarter-backing of good faith discretionary board decisions effectively threatens to disrupt the management of the nearly 2,700 public employee retirement systems in the country. In recognition of the unprecedented and important legal issues involved, on August 22, 2008, NCPERS filed a friend of the court (amicus) brief in the *Lexin* case which is currently on appeal before the California Supreme Court.

The pension deliberations at issue in the *Lexin* case did not take place behind closed doors in a dark, smoke filled room. Rather, all board decisions in the case occurred in consultation with the plan's actuary and attorney at open meetings, before being voted upon with the full knowledge of the city, unions and public.

For many public pension trustees, service on a public pension board is purely voluntary and unlike corporate boards of directors, unpaid. Depending on the size of the particular retirement system, plan assets in certain public plans are larger than the capitalization of publically-traded corporations. Exposing public pension trustees to criminal liability for following the advice of counsel and attempting to perform their fiduciary duty will discourage service by the very people who should be encouraged to volunteer as trustees on public pension boards.

By design, public pension boards are routinely comprised of trustees who are members of the plan. To the extent that trustees often wear several hats, this is purposely built into the structure of the respective pension board. Placing trustees in legal jeopardy for making good faith fiduciary decisions is unnecessary, counterproductive and will undermine the structure of the boards they serve.

The NCPERS amicus brief makes three principal arguments: 1) criminal liability for trustees who are attempting to perform their job as fiduciaries will have a chilling effect and will undermine the intentional and inherent structure of governmental pension boards around the country; 2) public pension trustees, many of whom serve on a part-time, voluntary basis, should not be subject to stricter standards than those applied to corporate officers and private sector ERISA trustees; and 3) the lower court ruling is contrary to effective trust management, sends mixed messages, and undermines well-established fiduciary principles.

NCPERS has previously filed friend of the court briefs in other important cases of interest to public pension plans, their members and beneficiaries.

Lexin v. Superior Court, 154 Cal. App. 4th 1425 (Cal. App. 2007); reviewed granted, Case No. 157341 (Cal. 2008).

Normal Retirement Age Regulation and Market Rate of Return Issues remain Unresolved. IRS Announces relief at House Ways and Means Committee Roundtable.

The IRS issued regulations prohibiting in-service distribution to persons rehired prior to "normal retirement age." Under the regulation, which is scheduled to take effect for plan years beginning after January 1, 2009, sets a safe harbor age of 62 for employees, except for public safety employees for whom the normal retirement age is presumed to be age 50. Persons retiring earlier may not receive their pensions if rehired by the same agency. The normal retirement age regulation may also have the effect of interfering with the insurance provisions of the Pension Protection Act which require retirement as a public safety officer "after reaching normal retirement age." NCPERS and numerous other groups have petitioned the IRS to delay the effect of the regulation. That request is pending.

If uncorrected, this provision would also prevent public safety officers retiring under the age of 50 from receiving the \$3000 annual tax exemption for health and long term care insurance, despite interpretations by the IRS to the contrary thus far.

The issue was specifically addressed to the Treasury Department and the IRS during the House Ways and Means Committee Workshop held in Washington on September 19th. During that meeting attended by several high ranking IRS and Treasury Department officials, it was announced that the normal retirement age regulation would likely be delayed and that an announcement on that issue was imminent. During the workshop, it was pointed out by NCPERS General Counsel, Robert Klausner, that enforcement of the rules would wrongly force plans to choose between tax qualification and state constitutional contract and property rights. In conjunction with the Treasury announcement, the IRS Commissioner for Government Plans announced that the IRS would be revisiting the "Cycle C" reporting schedule currently set to end January 3, 2009. The IRS had previously urged all public plans to seek a determination letter by that date.

A provision of the Pension Protection Act provides that "notional accounts" such as cash balance plans and DROP accounts which are credited with earnings higher than the "market rate of interest" will be deemed age discriminatory. This would effectively require drastic reductions of constitutionally-protected benefits. A corrective bill has passed the House and Senate action is pending. The recent decision in *Kentucky Retirement Systems v. EEOC* may also be of assistance in challenging this issue.

The House passed a corrective bill in August addressing the issue of market rate of return and as of the day of the preparation of this outline in late September, the bill had yet to be taken up by the Senate.

In Order to be Effective, a Beneficiary Designation Form Must be Filed Before the Death of a Member.

Prior to his death, decedent executed a form designating his former spouse, his two children, and his girlfriend as the primary beneficiaries of his ordinary death benefit. The following year, the relationship between decedent and his girlfriend ended. On February 15, 2005, he executed a new beneficiary designation form, designating the

petitioner as a beneficiary, and removing his ex-girlfriend as a primary beneficiary. Decedent committed suicide on February 18, 2005, and the Retirement System received the new designation form on February 22, 2005. Decedent's counsel advised the Retirement System of his death and sought to confirm that the new designation form had taken effect. However, the retirement system responded that the new designation form had been received after the date of decedent's death, and it could not be accepted. Therefore, the payment of decedent's death benefits would be made to the beneficiaries named in the old designation form. The Retirement and Social Security Law provides that ordinary death benefits are payable to beneficiaries who have been nominated by the member of the retirement system to receive them. The nomination must be in the form of a written designation, duly acknowledged and filed with the comptroller for this specific purpose. The retirement and Social Security law provides that a document is deemed filed on the date of mailing only if it was sent by certified mail, return receipt requested. Otherwise, the filing only occurs upon actual delivery and receipt by the retirement system. It is uncontroverted that the new designation form was not mailed by certified mail, and that decedent's death occurred before the retirement system received it. Since the filing of this form did not occur until after decedent's death, the old form, which designated the former girlfriend as a beneficiary, was still valid at the time of decedent's death. Consequently, the court held that the retirement system's denial of petitioner's application for benefits was both rational and supported by substantial evidence.

Krysa v. New York State and Local Retirement System, 2008 WL 2919699 (N.Y.A.D. 3 Dept. 2008)

Accidental Disability Retirement Benefits are Not Granted Solely Because an Injury Happened While at Work; an Applicant Must Show that the Injury was Sustained While in the Performance of the Employee's Job Duties.

While an employee, a civilian 911 dispatcher, was standing in front of her desk and computer, a police officer approached her from behind and, in an attempt at horseplay, placed her in a headlock. The officer pulled the employee away from her desk and about eight feet across a break room where their feet became entangled and they fell against a wall and then to the floor. The employee injured her wrist and her elbow, and she could not return to work. The employee applied for accidental

disability retirement benefits. In order to receive accidental retirement disability benefits, an applicant must show that she is unable to perform her job duties by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of her duties. The court held that the employee's disability was not due to an injury sustained "while in the performance" of her duties as a civilian 911 dispatcher. The disability arose from an occurrence that had nothing to do with the performance of the employee's job duties, or even with a hazard of the type reasonably to be expected in the performance of those duties. The employee's claim failed because her disability does not arise from an injury sustained, or a hazard undergone, while in the performance of her job.

Damiano v. Contributory Retirement Appeal Bd., 890 N.E.2d 173 (Mass. App. Ct. 2008)

The Board's Statutory Duty to Provide Health Insurance Coverage to Active Police Officers and Retired Police Officers Required the Board to Provide Each Group with Substantially Similar Health Insurance Benefits.

Prior to 2006, retired police officers received health insurance coverage without having to pay insurance premiums. In 2006, the board altered the health insurance plan for retired officers, which required the retirees to pay a \$251 monthly premium for extensive health coverage. The plan offered the same extensive coverage to active police officers free of charge. The Police Officers' Association alleged that the new insurance plan was inconsistent with the statute which provided that the board "shall provide" health insurance to police retirees. The court noted that the board was required to provide healthcare to active employees, and the board fulfilled this duty by providing the active employees with extensive health insurance coverage without requiring them to pay monthly premiums. The court found that the statutes impose the same duty to provide health insurance coverage to retirees, but the board now requires the retirees to pay a substantial monthly premium. The board does so despite the fact that the retired officers invested their entire career in the police department in consideration for a promise of healthcare in retirement, only to have the board change course after the officers retired. The promise of healthcare in retirement is a critical benefit given the enhanced risk of injury and disability inherent in police duties. The difference in insurance benefits offered to active officers and retirees is not consistent with the nearly identical statutory duties

requiring the board to "provide" health insurance benefits to both its active officers and retirees. In order to avoid unreasonable discrepancies in insurance coverage, the board must provide its retirees with substantially the same level of reasonable benefits provided to active duty officers without payment of a premium.

St. Louis Police Officers' Ass'n v. Board of Police Com'rs of City of St. Louis, 2008 WL 2583028 (Mo. 2008)

An Employee, Who was Hired in a Position that is not Covered by a Retirement System, May Not be Granted Pension Benefits Simply Because the Employee Performed the Duties of Position that is Covered by a Retirement System.

An employee was initially hired as a laborer, but after a few months agreed to drive a truck. The employee received road training and obtained a class three driver's license. At the time he began driving a truck, he also received a pay raise. In addition to driving, the employee continued to perform some of the tasks of a laborer. When the employee requested the opportunity to join the New York State and Local Employees' Retirement System, he was told that he was not eligible because he was hired as a laborer. After working in the private sector for approximately 20 years, the employee again became a public employee. In 2005, the employee applied to the retirement system for reinstatement based on his earlier employment as a truck driver. The comptroller denied the employee's application on the basis that he had not submitted documentation from the state or county civil service department establishing that he was employed with the title of a truck driver for which membership in the retirement system was mandatory, which would entitle him to retroactive membership, and the employee appealed. On appeal, the employee admitted that he continued to perform some work as a laborer even after he began driving a truck, and the testimony of his fellow employees did not unequivocally establish that he had been reclassified as a truck driver. The court held that his attainment of a class three license and his increase in pay did not establish his title as a "truck driver." The court held that the employment records indicate that the employee never held any position other than a laborer, and the court denied retroactive retirement benefits.

Wilson v. DiNapoli, 859 N.Y.S.2d 314 (N.Y.A.D. 3 Dept. 2008)

Police Officer was Granted Line-of-Duty Disability Benefits, Even Though His Injury was Caused by Moving Blocks, Because His Injury was Incurred While Trying to Eliminate a Public Safety Hazard.

Police officer was injured when he was dispatched to the community recreation center to respond to a call reporting juveniles engaging in mischievous conduct. The head of recreation for the village reported that juveniles were stacking parking blocks in the community center parking lot. When the officer arrived, three concrete parking blocks were stacked in the parking lot. The officer injured his back while attempting to move the parking blocks. Several physicians subsequently examined the petitioner's injury and determined that he was disabled and no longer able to perform the duties of a police officer. The officer filed an application for line-of-duty disability benefits pursuant to the Illinois Pension Code (the Code). The pension board denied the officer a line-of-duty disability pension stating that the petitioner's injuries were not caused or incurred in the performance of an act of police duty because the act did not involve any special risk that is not ordinarily assumed by citizens in the ordinary walks of life, as required by the Code. The officer argued that moving the parking blocks was an extension of his duty to protect the public. The court agreed with the officer and held that his acts were that of a police officer responding to a civilian call; trying to immediately eliminate a public safety hazard. Thus, the officer was entitled to a line-of-duty pension for his injuries.

Merlo v. Orland Hills Police Pension Bd., 890 N.E.2d 612 (Ill. App. 1 Dist. 2008)

Disability Benefits Must be Based on the Rate of Pay at the Time of a Line-of-Duty Injury and May Not be Reduced Even if the Decision to Reduce the Applicant's Salary was Made Prior to the Injury.

A firefighter was injured in the line of duty while removing a stove from a garage fire, and was again injured while lifting a patient into an ambulance. The firefighter sought medical care after the injury and he required surgery for his lower back. The firefighter was paid six months of benefits pursuant to the Public Employee Disability Act (Act), after which he returned to work. The firefighter was injured again while removing an oxygen tank from an ambulance. At the time of his injury, the firefighter was being paid as a shift commander, an amount 5% higher than his pay as a firefighter. However, the fire district (district) calculated the firefighter's benefits

under the Act based on his lower pay as a firefighter. The district contends that the firefighter's benefits should be calculated based on the lower salary because the decision to return the firefighter to the lower pay scale was made before the firefighter's injury. The firefighter argued that he was entitled to receive benefits based on his rate of pay at the time of the injury, and that the reduction in benefits based on his reduced pay scale, which occurred one month after his injury, was a violation of the Act. The court agreed with the firefighter stating that the Act prohibits the reduction of pay after a line-of-duty injury even if the decision to reduce a salary was made before the injury.

Bahr v. Bartlett Fire Protection Dist., 889 N.E.2d 760 (Ill. App. 1 Dist. 2008)

Conviction of Federal Felonies Does not, Without Showing a Violation of a Member's Oath of State Office, Automatically Forfeit Pension Benefits.

An elected member of the House of Representatives had 54 years of service credit in a retirement system and was eligible for a monthly benefit based on his final average compensation. The member pled guilty to two federal felony counts and one federal misdemeanor count. The retirement system's general counsel notified the member that the crimes for which he pled guilty violated his oath of office as a state officer and that all non-vested benefits were forfeited. The court found that the Oklahoma statutes make a clear distinction between forfeiture of the office and forfeiture of benefits. A plea of guilty to a felony forfeits the office, but forfeiture of benefits occurs only if the felony or other offense also violates the oath of office. Thus, pleading guilty to a felony is not enough to warrant a forfeiture. The offenses must violate the member's oath of office for state service. The court held that the board acted arbitrarily and capriciously by failing to follow its own administrative policy that a violation of federal law unrelated to the duties of the office of state senator is not a violation of the senator's oath and would not support forfeiture of retirement benefits. The court noted that twelve years ago, the board did not forfeit a member's benefits who was convicted of five federal felonies. The court stated that a longstanding administrative interpretation may not be reversed by the agency absent a cogent reason. The Oklahoma legislature has not acted to express disapproval of the board's prior ruling and therefore the board may not rule to the contrary absent compelling, forceful or conclusively convincing grounds. Since

compelling grounds were not stated, the court held that the member's benefits could not be forfeited.

Stipe v. State ex rel. Bd. of Trustees of Oklahoma Public Employees Retirement System, 188 P.3d 120 (Okla. 2008).

The Denial of an Application for Accidental Disability Retirement Benefits is Proper When the Injury Was Not Caused by an Accident.

A police officer applied for accidental disability retirement benefits after allegedly sustaining disabling injuries to his back due to three separate incidents. The officer was injured when he slipped and fell on wet grass while carrying athletic equipment, and while helping to move bleachers during a police-sponsored softball tournament. The officer was injured again when he slipped on the stairs at police headquarters. Following a hearing, the officer's application was denied on the ground that his injuries did not constitute accidents within the meaning of the retirement and Social Security Law. The court held that an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury. At the time the officer fell, he was carrying athletic equipment across a wet grassy area in the course of his usual assigned duties, and the court stated that exposure to wet grass is an inherent risk that would ordinarily be anticipated. The court held that the injury resulting from the officer falling on the stairs at police headquarters, which he frequently used and does not claim were obstructed or defective at the time he slipped, was caused by his own misstep while performing routine employment duties and was not the result of an unexpected event. Since these injuries were not the result of an accident, the court determined that the denial of benefits was proper.

McGerald v. DiNapoli, 857 N.Y.S.2d 813 (N.Y.A.D. 3 Dept. 2008)

Personal Use of an Employer's Automobile is not Considered "Regular Compensation" for Purposes of Computing Pension Benefits.

The city commissioner retired after thirty-two years of creditable service as a public employee. Initially, the commissioner's retirement allowance was calculated using his "regular compensation," which included the value of his authorized personal use of an employer-supplied automobile. However, the board, relying on newly released decisions regarding the same issue, determined that the personal use value of an employer-supplied vehicle should not be included as "regular compensation" when calculating a pension benefit. The board notified the commissioner that his monthly retirement benefits would be reduced by the amount of his pension that was based on the value of his personal use of the automobile. The court held that the term "regular compensation" broadly denotes ordinary, recurrent, or repeated payments not inflated by any "extraordinary ad hoc" amounts such as bonuses or overtime pay. The commissioner's employment agreement with the city expressly required that he be "on-call" for emergency response at all times. The court noted that the city contemplated that the commissioner would use the automobile as a tool, or piece of equipment, that would enable him to perform his job more effectively. The court concluded that the automobile was not intended to compensate the plaintiff for his service to the city as commissioner, but rather given to him to use in connection with his professional duties, with authorization to use it for personal reasons, since he was on-call in the event of an emergency.

Pelonzi v. Retirement Bd. of Beverly, 886 N.E.2d 707 (Mass. 2008)

Hearing Officer Must Consider the Evidence in the Record in Order to Make a Determination as to Whether an Applicant is Disabled.

Petitioner was injured when he tripped and fell over wire spools while attempting to close a water valve at a municipal water treatment plant. The comptroller found that the petitioner had not sustained an accident within the meaning of the retirement and Social Security laws and denied his application for accidental disability retirement benefits. The court annulled that determination, finding that petitioner's fall did constitute an accident and remitted the matter to the comptroller. Following additional hearings, the hearing officer denied petitioner's application, finding that he is not permanently incapacitated from performing his regular job duties. The comptroller made supplemental findings of fact, but upheld the hearing officer's

decision, and the petitioner appealed. The comptroller conceded that the hearing officer never considered testimony of the petitioner or his physicians. The court held that the hearing officer failed to consider the bulk of the petitioner's medical evidence, and therefore lacked an adequate statement of factual basis for denying the application. The court stated that it was prevented from making a determination as to whether the hearing officer's decision was rationally based on the record and annulled the denial of benefits.

Cantone v. DiNapoli, 855 N.Y.S.2d 728 (N.Y. A.D. 3 Dept. 2008.)

Failure to Appeal the Board's Decision Within the Applicable Statute of Limitations Deprives the Appellate Court of Jurisdiction, and the Court May Not Hear the Appeal.

A petitioner sought to appeal a decision of the board of trustees to offset his disability retirement pension by the amount he received from his workers' compensation claim. The court held that appeals must be filed within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing. Since the board denied the petitioner's motion for rehearing, he had to file his appeal within thirty days. However, the petitioner filed his appeal on one day late. The petitioner contends that the court may waive the thirty-day appeal period for "good cause," but the court held that he was mistaken. The court has repeatedly held that they follow the majority rule regarding compliance with statutory time requirements, and, thus, one day's delay is fatal to a party's appeal. The court held that compliance with a statutory appeal period is a necessary prerequisite to establishing jurisdiction in the appellate body. The petitioner's failure to comply with the appeal period deprived the court of jurisdiction to hear an appeal.

In re Carreau, 945 A.2d 687 (N.H. 2008)

Officer was Entitled to Include Her Time Working as a Civilian Translator in Calculating Her Pension Benefits.

An officer was appointed to the police department in 1986. The officer worked for the department as a civilian Spanish translator immediately prior to becoming an officer. As a translator, her main function at the station was interpretation. The officer did not just provide literal translations; she was required to initiate particular lines of questioning when the police officers seeking translation did not ask questions relevant to the situation. She would also assess the credibility of the civilians for whom she translated and relay her impressions to the police officers involved. During her time as a civilian translator, the officer would substitute for police officers on vacation in the review office. In that role she examined confidential case reports to determine whether there were patterns indicating that one offender might be involved in more than one crime. She would then submit written reports of her conclusions to the department. The officer applied for pension benefits including her years of service as a civilian translator. The officer relied on the pension code which stated that any participant is entitled to credit for services rendered prior to becoming an officer while performing investigative work for the department as a civilian employee of the department. The board denied her request stating that the petitioner did not "systematically examine" a reported incident; did not participate in the collection of evidence; and did not determine what charges should be lodged against offenders. However, the court held that the plain and ordinary meaning of "investigative work" includes the activities described by the officer and her four witnesses. The court held that the officer has presented unrebutted evidence which satisfies the provisions of the code and granted her request to have her pension benefits calculated including her time working as a civilian for the police department.

Diedrich v. Retirement Bd. of Annuity and Ben. Fund of City of and Ben. Fund of City of Chicago, 887 N.E.2d 553 (Ill. App. 1 Dist. 2008)

Failure to File a Disability Pension Application Within the Applicable Statute of Limitations Bars any Claim to a Disability Benefit.

While in the process of instructing a mentally disabled client how to cook, a community living aide momentarily left the kitchen, during which time the client dropped eggs on the floor. As she reentered the kitchen, the aide fell and injured her lower back. A day later, the aide sought treatment, and as the pain persisted,

she began a physical therapy program. An MRI revealed a herniated disc, and she underwent surgery, which somewhat alleviated the aide's back pain, but the pain in her leg increased. The aide sought psychiatric treatment for mental anguish associated with the pain from her slip-and-fall injury. Although she requested a disability application in the fall of 1997, the aide did not actually file for benefits until the summer of 2002, which was beyond the five-year limitation period. The court upheld the denial stating that the statute requiring state employees to apply for accidental disability pension benefits within five years of the alleged accident causing the injury did not authorize equitable tolling of the statute of limitations to permit an employee to file an untimely disability claim on the basis of a mental disability. The court found the statute of limitations governing accidental disability claims was intended to be stringent because the retirement system is a complex administrative agency overseeing a large number of claims.

Iselin v. Retirement Bd. of Employees' Retirement System of Rhode Island, 943 A.2d 1045 (R.I. 2008)

Preexisting Non-Work-Related Conditions do not Bar Recovery When the Petitioner Demonstrates that the Job Duties were a Direct Cause of the Disability.

Police officer suffered from a fall which occurred in the performance of his duties. Although the officer's medical records refer to preexisting injuries to his knees, the records unequivocally established that the officer sustained acute bilateral medial meniscal tears with subsequent surgical repair while performing his duties. The records also demonstrated that the petitioner's line of duty injuries were a direct cause of his disability. The court held that the pension board's denial of the officer's disability pension application was not rationally based upon the evidence presented and the denial was found to be arbitrary and capricious. In order to be eligible for disability benefits a municipal employee need only prove a direct causal relationship between job duties and the resulting illness or injury. Since the officer was able to perform all of his job duties prior to the accident, the court found that the line of duty fall was the cause of his disability.

Schmidt v. Putnam County Office of Sheriff, 854 N.Y.S.2d 178 (N.Y.A.D. 2 Dept. 2008)

Pension Board is not Required to Give Advisory Opinions.

A prosecutor requested formal opinion from a pension board stating that he could continue to do freelance work for the prosecutor's office without affecting his pension benefits. The prosecutor's letter described a proposed contract formulating the post-retirement arrangement, and he explained that he thought the contract would create an independent contractor relationship. The board advised him that the proposed arrangement would violate the enrollment provisions as it would constitute an extension of the prosecutor's employment. The board stated if the prosecutor's retirement income for work done as a contractor exceeded \$15,000 per year, he would be required to re-enroll as a member as a condition of employment, and the letter advised that he could file an appeal to the board. The prosecutor appealed to the board and requested a hearing. The board denied his request stating that there is neither an anticipation of a retirement nor an independent contractor relationship between the prosecutor and the county currently before the board. The court upheld the board's decision stating that the board has provided as much guidance to the prosecutor as it can based on the general facts presented, but the guidance is not a declaratory ruling pursuant to the Administrative Procedure Act. The board may decline to issue a formal ruling because the issuance of a declaratory ruling is a discretionary matter, vested exclusively with the agency head. The court held that the board may decline to issue an advisory opinion.

Kaflowitz v. Board of Trustees, 2008 WL 695876 (N.J. Super A.D. 2008)

In Order to Receive Accidental Disability Pension Benefits for a "Traumatic Event," the Disability Must Result from Direct Personal Experience of a Terrifying or Horror-Inducing Event that Involves Actual or Threatened Death or Serious Injury, or Similarly Serious Threat to Physical Integrity of an Applicant or Another Person.

Police officer was humiliated by his sergeant at work. As a result, the officer stated that he was ostracized by his peers and he became depressed and introverted. He also stated that he gained weight, lost interest in trying to better himself, and began to feel physically ill on days he had to work. The officer filed an application for an

accidental disability retirement. The board determined that the officer was permanently and totally disabled, but the board awarded ordinary disability benefits and denied his application for accidental disability benefits. The board determined that, although the officer's disability resulted directly from the sergeant's humiliation, this did not constitute a "traumatic event," which is necessary to receive accidental disability benefits. The court agreed with the board and held that the officer does not qualify for accidental disability benefits because a traumatic event consists of a direct personal experience of a terrifying or a horror-inducing event that involves actual or threatened death or serious injury, or similarly serious threat to physical integrity of applicant or another person. Although the conduct of the officer's superior was cruel, the court held that it did not involve actual or threatened death, or serious injury to the officer's physical integrity, and thus was not a traumatic event necessary to receive accidental disability benefits.

Patterson v. Board of Trustees, State Police Retirement System, 942 A.2d 782 (N.J. 2008)

There is no Applicable Statute of Limitations to a Disciplinary Administrative Forfeiture Proceeding.

After witnessing a robbery, an officer and his team chased four fleeing suspects. The officer shot and killed one of the suspects, another suspect was shot and killed, a third was apprehended, and the fourth managed to escape. Other officers planted weapons on the suspects' bodies to explain their actions and validate the shootings. After the incident, the officer gave a sworn statement to homicide investigators wherein he covered up the actions of the other officers by falsely stating that the fleeing suspects were carrying weapons before they were shot. The officer subsequently retired from the police force and received full pension benefits. The officer was later charged by information with conspiracy to obstruct justice and deprive Miami's citizens of rights, privileges, and immunities, in violation of federal law. The officer entered a plea of guilty, admitting that he gave a false and misleading sworn statement, and he was adjudicated guilty. The pension board held a hearing and determined that the officer forfeited his pension benefits because he committed a specified offense under Florida law. The officer appealed claiming that the statute requires notice to the Commission on Ethics, that a forfeiture action was commenced after the applicable statute of limitations, and the crime for which he was convicted was not a specified offence. The court held that the board was authorized to commence the administrative forfeiture determination against the

officer without involving the Commission on Ethics, there is no statute of limitations period applicable a disciplinary administrative action, and the acts were punishable in Florida as a felony involving a breach of the public trust, which amounted to a specified offense for the purposes of the forfeiture statute.

Hames v. Firefighters' and Police Officers' Trust, 980 So.2d 1112 (Fla. 3rd DCA 2008)

Florida Forfeiture Law Does Not Violate Federal Constitution.

In a related case, the U.S. Court of Appeals for the 11th Circuit considered an appeal by a Miami police officer whose civil rights action against the two police retirement plans was dismissed. The officer sued claiming that the failure of the pension funds to guarantee the appearance of certain FBI agents with whom the officer had cooperated at his pension forfeiture hearings, following his conviction for federal obstruction of justice charges, denied him due process of law. The officer also contended that suffering a forfeiture for his conviction after testifying against other officers violated his First Amendment rights. Lastly, the officer contended that the crime of conspiracy to deprive civil rights did not fall into the "catch-all" provisions of Section 112.3173, Florida Statutes. In a unanimous opinion, the Court of Appeals rejected all of the arguments and upheld the dismissal of the civil rights claim. The U.S. District Court ruling that commencement of forfeiture proceedings was mandatory was upheld. Moreover, the Court held that the absence of the witnesses was the fault of the officer. Even if they had appeared, however, their testimony would not have changed the fact of the forfeiture.

Hames v. City of Miami, 2008 WL 2097659 (11th Cir. 2008)(unpublished)

Pension Board Denied Disability Benefits to a Police Officer Because He Refused to Submit to a Safe Surgical Procedure to Cure his Disability.

Police officer filed for accidental disability and performance of duty disability retirement benefits alleging that he was permanently disabled due to an injury to his thumb sustained while making an arrest. Following hearings, the officer's application

was denied. The court upheld the comptroller's decision stating that the officer was not incapacitated from performing the duties of a police sergeant. A board-certified orthopedic surgeon examined petitioner on behalf the retirement system and testified that safe and effective surgical procedures were available to correct both of the officer's two conditions. The officer's medical records indicate that his treating physicians recommended surgery, which was not performed solely because the officer refused to submit to surgery. The court held that the officer unreasonably refused to submit to a safe and effective surgical procedure to resolve his disability and, thus, failed to establish that he was permanently incapacitated.

Mullins v. New York State Comptroller, 853 N.Y.S.2d 216 (N.Y.A.D. 3 Dept. 2008.)

In Order to Forfeit Pension Benefit Rights for the Conviction of a Felony, a Nexus Must Exist Between the Felony and the Performance of Official Duties; a Mere Conviction of a Felony While Employed by a City is not Sufficient.

An operating engineer in the Department of Water of the City of Chicago (City), pled federal mail fraud, a federal felony, arising from his participation in a scheme to pay bribes the First Deputy Commissioner of the City's Department of Water, in exchange for directing trucking business under the City's Hired Truck Program (HTP) to Garfield Trucking, Inc. (Garfield). Following the plaintiff's conviction, proceedings were instituted before the board to declare him ineligible for pension benefits. The fund filed a motion for summary judgment supported by the engineer's felony conviction and the admissions made in his plea agreement, arguing that the engineer is ineligible to receive pension benefits from the fund. The board granted the motion for summary judgment, concluding that there is no issue of material fact that the engineer was convicted of a felony relating to or arising out of or in connection with his service as a municipal employee, and the engineer appealed. On appeal, the court ruled that a pension forfeiture requires a nexus between the felony of which the employee has been convicted and the performance of his official duties; mere conviction of a felony while one is a municipal employee is insufficient to justify a forfeiture of pension benefits. The court found nothing in that plea agreement speaks to the reason why the plaintiff was asked to participate in the scheme, nor were there any facts in the plea agreement which would support an inference that the relationship between the plaintiff any of the co-conspirators was

cultivated because the engineer was an employee of the City's Water Department, or that he had ever used his position as a city employee for the benefit his co-conspirators. The court found that the most that can be said based upon the facts set forth in the plea agreement is that the engineer participated in a felonious scheme, while employed in the City's Water Department. None of the admissions in the Plea Agreement support the conclusion that the scheme was the product of the engineer's status as a City employee or that he used his position as a City employee to facilitate the scheme. The court found that the facts admitted by the engineer in his plea agreement did not establish a clear and specific connection between the felony of which he was convicted and his municipal employment. Consequently, the court held that the Board erred when it found no genuine issue of material fact on the question of whether the engineer was convicted of a felony "relating to or arising out of or in connection with his service as a municipal employee" and in entering summary judgment in favor of the Fund.

Romano v. Municipal Employees Annuity and Benefit Fund of Chicago, 2008 WL 3189277 (Ill. App. 1 Dist. 2008)

Before Credited Service Time is Purchased, the Employee's Right to Credit for Prior Service is an Inchoate Right that may Never be Acquired, and Service Credit is not "Established" Until it is Purchased.

An assistant prosecutor had credited service as a prosecutor for multiple county prosecutor's offices. In 2002, a statute was enacted creating the Prosecutors Part of the Public Employment Retirement System ("PERS"), which provides more generous pension benefits than the regular PERS. The prosecutor applied to the Division of Pensions to purchase service credit for his prior period of service as an assistant prosecutor and he paid the required contribution. In 2003, the Division of Pensions advised the prosecutor that he had eighteen years and four months of service credit in the Prosecutors Part. The prosecutor claimed that his Prosecutors Part service credit identified by the Division was incorrect because it did not include the forty-eight months of service credit he had purchased in June 2002. The Division advised him that the Prosecutors Part statute did not provide for the purchase of additional service credit, and therefore, the service credit he purchased in June 2002 had been applied to his regular PERS account, and the prosecutor appealed. The court held that an employee has no right to service credit for a prior period of public employment unless and until (s)he purchases that credit. Before the credit is purchased, the employee's right to pension credit for prior service is an

inchoate right that may never be acquired. Consequently, service credit is not "established" until it is purchased. The court held that the addition of the Prosecutor's Part did not deprive the prosecutor of any rights he would otherwise be entitled, and it afforded him the opportunity to qualify for the enhanced new benefits.

DeMarco v. Board of Trustees of Public Employees Retirement System, 2008 WL 2404179 (N.J. Super. A.D. 2008)

There is no Equal Protection Violation When There is a Clear Rational Reason for Disparate Treatment of Two Classes of Employees.

The position of prosecuting attorney for a third class county, was part-time. On August 4, 1998, the citizens of the county voted to make the position full-time. However, the county commission declined to "elect to have that position also qualify for the retirement benefit available for a full-time prosecutor of a county of the first classification," and continued to pay a lower level of contributions to PACERS for the prosecutor. In 2005, PACERS petitioned the to compel the county to pay the difference between the amount actually paid and the higher amount that was allegedly owed once the prosecuting attorney position was made full-time. PACERS claimed that the difference in the contributions for prosecuting attorneys in third-class counties whose positions were made full-time before August 28, 2001, and the compensation for prosecuting attorneys in third-class counties whose positions were made full-time after August 28, 2001, was an equal protection violation. The court found a rational reason for the disparity in payments because the citizens of third-class counties voted to make the county prosecutor a full-time position when the county contribution to the retirement fund was set at the lower monthly amount. In 2001, county contributions for full-time prosecuting attorneys was increased for those counties which elected to make the position of prosecuting attorney a full-time position. The court held that the inclusion of the August 28, 2001, cutoff reflects the legislative intent to impose upon the counties no greater obligation than the voters approved, and that is a valid basis for the disparity. Since the court found a valid reason for the disparity, there was no equal protection violation.

Missouri Prosecuting Attorneys and Circuit Attorneys Retirement Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System v. Pemiscot County, 256 S.W.3d 98 (Mo. 2008)

Although Investing in a Private, Irrevocable Investment Trust is Permitted by GASB 45, and it Would be a Way for Governmental Entities to Use Public Funds to Earn a Good Rate of Return on Investments, the Requirements of GASB 45 Cannot Serve to Override the Prohibition in the State Constitution From Investing in Equities.

A City provides its employees with retirement pay and other post-employment benefits (OPEBs). The Municipal Association of South Carolina established the South Carolina Other Retirement Benefits Investment Trust ("ORBIT"), to receive funds from municipalities, to invest those funds in equity securities to attain a higher rate of return. A city employee, and future recipient of OPEBs, filed a declaratory judgment action seeking a declaration that the City's participation in ORBIT was unconstitutional, violated statutory law, and violated public policy. The court held that a clear reading of the constitution reveals that a municipality cannot invest in equity securities. If merely contributing the funds to a trust which then invested in equity securities would have allowed the State to avoid the prohibitions of investing in equities, the constitutional ban on equity investing would have been unnecessary. Allowing the City to invest in equity securities through a trust violates the intent of the constitution to protect public funds from risky investments. The court stated that it is troubling that the City attempted to avoid the constitutional prohibition on investing in equity securities by merely setting up a trust. Although ORBIT is set up as a trust, it functions as an investment manager for the City and is no different than any other investment house; the veneer of a trust does not change its status. The City's actions are laudable and well intended, but they do not obviate the requirement to comply with constitutional mandates of the South Carolina Constitution specifically limits how government funds may be invested.

O'Brien v. South Carolina ORBIT, 2008 WL 3821317 (S.C. 2008)

Borough Could Not Require that a Police Officer Show that He was Honorably Discharged and Eligible for Worker's Compensation Because the Collective Bargaining Agreement Did Not Provide These Requirements.

A police officer was dispatched to assist other police agencies looking for a suspect involved in a shooting. When he arrived at the scene, the suspect began shooting

at the officer, and he returned gunfire. The suspect eventually fell to the ground at which time the officer kicked his gun away. When the officer approached the suspect to take him into custody, he jumped up and ran. The officer fired three rounds, and the suspect went down again. When the suspect reached in his waistband, another police officer yelled that the suspect had another gun. The officer fired two more rounds at the suspect who no longer moved, and he was then taken into custody. As a result of this incident, the officer was diagnosed with post traumatic stress disorder, and his physician opined that he was permanently and totally disabled. The officer applied for a line of duty disability pension benefit, which was granted. The Borough appealed stating that the officer did not prove that he was honorably discharged, or that he was eligible for workers compensation, as required by the Police Pension Act.. However, the court held that police pensions are a mandatory subject of collective bargaining, and the collective bargaining agreement ("CBA") between the Borough and the Union provided that an officer that becomes disabled due to a work-related injury shall collect a pension. The court held that the CBA did not contain any language regarding an honorable discharge or a requirement that an officer be eligible to receive workers' compensation, and granted a work-related disability pension.

Borough of Mahanoy City v. Mahanoy City Police Dept., 948 A.2d 239 (Pa. Cmwlth. 2008)

Using Heightened Knowledge of Law Enforcement Techniques, Police Training, and Knowledge of Police Business to Commit a Crime Constitutes a Sufficient Nexus to the Police Officer's Duties to Be Classified as a Specified Offense.

Officer Thomas Simcox pleaded guilty to the crime of conspiracy to possess heroin with the intent to distribute. Simcox admitted that he provided escort services for a truck driver who was carrying the multiple kilograms of heroin. Simcox's role in the drug trafficking scheme was to make sure that the truck driver did not encounter problems with the delivery. Simcox stated that he, his co-conspirators, and the undercover officers discussed the operation in detail. These discussions included the counter-surveillance techniques they would employ, and the methods they would use to ensure that the heroine delivery was successful. After the scheme was successful, Simcox was payed for his escorting services. The Board of Trustees of the Hollywood Retirement System determined that Simcox committed a specified

offense pursuant to 112.3173, *Florida Statutes*, and Simcox appealed. In order for the Board to forfeit pension benefits under section 112.3173, Simcox's crime must have been committed prior to retirement and the crime must have been connected to his employment as a police officer. On appeal, Simcox argued that his actions were not related to position as a police officer, and that he was technically retired prior to his participation in the drug trafficking scheme because he was in the Deferred Retirement Option Plan ("DROP"). However, the court held that Simcox's crime was significantly connected to his position as a police officer because he was selected for the trafficking operation due to his heightened knowledge of law enforcement techniques, his police training, and because he knew the enemy. The court also held that retirement, for DROP purposes, is separate from the meaning of retirement in section 112.3173. Chapter 185 defines retirement solely for the purposes of the plan, while section 112.3173 uses the common meaning for the word retirement, meaning an employee's voluntary termination of employment. The court held that the Board properly forfeited Simcox's pension benefits because he committed a specified offense prior to retirement.

Simcox v. City of Hollywood Police Officers' Retirement System, 988 So.2d 731 (Fla. 4th DCA 2008).

The Forfeiture of All Pension Benefits Does Not Violate the Protection Against Excessive Fines, the Double Jeopardy Clause, or the Constitutional Proscription of ex Post Facto Laws.

W.D. Childers was an employee as a teacher in the Florida Retirement System ("FRS"). After two years, Childers became a member of the Florida Legislature where he served for 30 years, and he accrued credited service under the FRS. In November 2000, Childers became a member of the Escambia Board of County Commissioners, and he continued to accrue years of credited service. During his term as a County Commissioner, Childers was convicted of bribery and unlawful compensation or reward for official behavior, and the parties stipulated that the crimes were not related to the employee's service as a teacher or a legislature. The Department of Management Services, Division of Retirement ("DMS") notified the employee of agency action to forfeit his rights pursuant to section 112.3173, *Florida Statutes*. On appeal, Childers argued that section 112.3173 is unconstitutional because it violates his constitutional protections against excessive fines, double jeopardy, and ex-post facto laws. The court disagreed stating that forfeiture of

employee's retirement does not violate Childers's protection against excessive fines because the constitutional protection against excessive fines applies only to fines directly imposed by, and payable to the government. Forfeiture of pension benefits is not a fine because the employee has not been ordered to pay anything to the government. The court next held that the right to a pension benefit is contractual in nature and the forfeiture of these benefits are merely the enforcement of a contract, not the imposition of a punishment, which would trigger protections against double jeopardy. Finally, the court held that the forfeiture of pension benefits does not violate the constitutional proscription against ex post facto laws. Ex post facto laws reach back in time to punish acts which occurred before the enactment of a law. Since section 112.3173 was enacted before Childers was convicted of a crime, it does not reach back in time to punish Childers for a crime committed prior to the enactment of this law.

Childers v. State, Dept. of Management Services, Div. of Retirement, __
So.2d __, 2008 WL 3914884 (Fla. 4th DCA 2008).

CONCLUSION

IF YOU HAVE ANY QUESTIONS OR COMMENTS CONCERNING THIS PRESENTATION, CONTACT ROBERT D. KLAUSNER, ESQUIRE, KLAUSNER & KAUFMAN, P.A., 10059 NW 1ST COURT, PLANTATION, FLORIDA 33324, (954) 916-1202, FAX (954) 916-1232, EMAIL bob@robertdklausner.com, WEBSITE, www.robertdklausner.com.