NATIONAL PENSION EDUCATION ASSOCIATION ANNUAL CONFERENCE

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National Caselaw Update

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I. COVID-RELATED BENEFIT LEGISLATION

A. Public Safety Officer Benefits

On August 14, 2020, "Safeguarding America's First Responders Act of 2020" (the "Act") was signed into law. This law provides presumptive line-of-duty death and disability benefits to qualifying police officers and firefighters. For the purposes of death and disability benefits, this law creates a general presumption that a public safety officer who dies from COVID-19 or related complications sustains a personal injury in the line-of-duty.

Under the Act, a qualifying public safety officer who dies or who becomes permanently and totally disabled due to COVID-19 (or from complications thereof) in 2020-2021 is entitled to a presumptive benefit under the Public Safety Officer Benefits (PSOB) program. To qualify for federal benefits, a public safety officer must meet the following four criteria for line-of-duty death:

1. No competent medical evidence exists that the officer's death was directly and proximately caused by something other than COVID-19;

2. The public safety officer was engaged in a line-of-duty action or activity between January 1, 2020, and December 31, 2021;

3. The public safety officer received a diagnosis of COVID-19 (or evidence indicates that the officer had COVID-19) during the 45-day period beginning on his or her last day of duty; and

4. Evidence indicates that the public safety officer had COVID-19 (or complications therefrom) at the time of his or her death.

There is also a presumption for eligibility for line-of-duty disability related to COVID-19 or complications from COVID 19. To qualify for federal benefits, a public safety officer must meet the following two criteria for line-of-duty disability:

1. The public safety officer was engaged in a line-of-duty action or activity between January 1, 2020, and December 31, 2021; and

2. The public safety officer received a diagnosis of COVID-19 (or evidence indicates that the officer had COVID-19) during the 45-day period beginning on his or her last day of duty

The COVID 19 duty-related presumption was extended through 2023 with the passage of S 1511, the "Protecting America's First Responders Act." The same bill also extended benefits to cadets and trainees. It also extended September 11 disability provisions retroactively.

II. CONSTITUTIONAL ISSUES

A. Federal Appeals Court Grants Some Relief But Not Enough to Save the U.S. Virgin Islands Fund - But a Bond Issue Does

The Government Employees Retirement System of the U.S. Virgin Islands (GERS) has provided retirement benefits to territorial officers and employees since the late 1950s. Almost since its inception, the Government (GVI) has failed to properly fund the system. In 1981, the Board of Trustees sued the GVI in federal court and they entered into a consent decree to provide for timely contributions. When the GVI failed to keep up with payments, a second action was brought and an amended decree was entered into in 1994. On several occasions after that, the Board sought judicial enforcement of the GVI's contribution responsibility but the courts refused to entertain the claims on the basis that no one was in danger of missing a payment. In 2016, the actuaries for GERS warned that without a major cash infusion, the Fund would exhaust its assets in 2023. Again, GERS brought an action and this time the federal court heard the matter. The court awarded $60 million in additional contributions but decided that the actuarially-required contribution was not covered by the consent decree. A federal appeals court upheld the $60M order but by a 2-1 vote affirmed that the decree did not encompass the remaining contributions. A suit has been filed in the territorial court (which did not exist when the consent decree was created) seeking enforcement of the remaining contributions. In the meantime, the race to insolvency and a loss of 25% of the territory's GDP looms.

Following the decision, in 2022, the parties negotiated an end to their litigation as the Territory adopted a multi-million dollar bond issue financed by the federal tax on rum. It will assure tens of millions of dollars in additional revenue to the pension fund over the next 40 years and assure its continued ability to pay benefits.

***GERS v. Government of the Virgin Islands*, 995 F.3d 66 (3d. Cir. 2021)**

B. Correction of Errors Implies Requirement of Improper Motive

A California Fire Chief sold accumulated leave to his employer for the purpose of increasing his final average compensation for pension purposes. A delay in his performance evaluations by the employer caused the credit of the sell-back to occur after the adoption of an anti-spiking law. The Pension Fund retroactively adjusted the Chief's benefits downward. The Chief's contract lawfully allowed the increase in compensation at the time it was entered into and therefore no improper motive existed. As such, the benefit was reinstated at the prior level, ending a 13-year legal battle.

***Nowicki v. Contra Costa Count Employees' Retirement Ass'n,* 67 Cal. App. 5th 736 (2021).**

C. Opportunity to Read Choice of Options Affirms Benefit Choice

A Florida Retirement System (FRS) participant suffering from alcoholism checked himself into a detox facility. After five days, the member checked himself out and returned to work at the Broward County Sheriff's Office. His wife accompanied him to work that day. The member received and began filling out retirement papers while his wife met with an officer to discuss her husband's troubles. The member chose a life-only annuity. The wife was presented with the document and she acknowledged the selection. Two years after retirement, the member died. The surviving spouse claimed she had the right to change the benefit option as her husband lacked the mental capacity to make a selection. Secondly, she claimed she had no meaningful opportunity to read the application. Following an administrative hearing, the request was denied. On appeal, the court found there was no evidence to demonstrate that the member was mentally incapable of making a choice, nor was there evidence the wife had sought guardianship of her late husband. The court also found there was no statutory authority to change the benefit option once

retirement payments commenced and the order denying the benefit change was affirmed.

***Demichael v. Dept. of Management Services, Div. Of Retirement*, 334 So.3d 691 (Fla. 1st DCA 2022)**

D. Decision Not to Implement Benefit Restoration Proposal Does Not Impair or Create a Constitutionally-Protected Contract

The University of California retirement plan is a defined benefit plan, subject to maximum compensation provisions of the Internal Revenue Code. The Board of Regents determined that this limitation on retirement benefits was a deterrent to recruitment and retention. As a result, the University president proposed a benefit restoration plan to mitigate the limitations and submitted the plan to the IRS for approval. Seven years later, the IRS approved the plan but before its implementation, the University decided to rescind the proposal. A group of retirees sued claiming breach of contract and impairment of contract. A trial court ruled against the retirees. On appeal, the court found that there was no evidence of a contract; instead, the University had simply considered establishing a plan, subject to later review and approval by the University President. That approval never took place and the proposal was rescinded before a plan was established. Ultimately, the Court held a "supposed contract" is not a guarantee of benefits.

***Broome v. Regents of the University of California*, 80 Cal. App. 5th 375 (2022)**

E. Statute Amending Funding Procedure Held Constitutional

In 2017, the Texas Legislature adopted a funding statute and procedure for the Houston Firefighters' Pension Fund which adopted certain actuarial standards to be applied and a funding method to reconcile differences between the Fund actuary and the City actuary. The Fund sued the City asserting the statute was unconstitutional and in violation

of Article XVI, Section 67(f) of the Texas Constitution which requires the Fund to engage an actuary and employ sound actuarial principles. As the challenged legislation had certain requirements regarding actuarial standards, the Board claimed that the law deprived the Board of its ability to be the sole judge of the assumptions to be used. A trial court declared the law invalid. The City appealed and on review, the appeals court reversed and dismissed the case. In reaching that conclusion, the appeals court found that the City had not waived immunity because nothing in the state constitution said that the setting of actuarial standards was the sole power of the Fund. Additionally, that same constitutional provision recognized the continuing power of the Legislature to ensure that retirement systems are financed using sound actuarial principles. While the constitution intended the retirement plan to be administered by the pension board as a fiduciary rather than the employer, the constitution did not limit the Legislature's ability to prescribe funding methods.

***City of Houston v. Houston Firefighters' Relief and Pension Fund*, __S.W.3d___, 2022 WL 3722140 (Tex. App. - Houston 8/30/2022)**

III. COST-OF-LIVING ADJUSTMENTS

A. Transfer of Local Plan to State Retirement System Does Not Result in Entitlement to COLA

A former municipal clerk retired under a local retirement plan in 1991. The plan was terminated and merged into the state retirement system in 2007. The retirement benefits continued without interruption. The local plan never provided a cost-of-living adjustment (COLA). The retiree claimed entitlement to a COLA from the state system effective upon the merger, despite having retired years before the merger. The Board determined that because the retiree had no service in the state plan, she was simply entitled to the benefits earned at time of retirement. The retiree sued the trustees both in their individual and official capacities. A trial court affirmed the Board decision. On appeal,

the Court deferred to the Board as the agency entrusted with application of the plan and upheld the denial.

***Bolding v. Arkansas Public Employees Retirement System*, 2022 Ark App. 275 (6/1/22)**

B. COLA Dispute is Not The Board's Responsibility

The retirement board voted to suspend COLAs for three years beginning in 2018. A legislative amendment that year allowed for COLAs but only after a period of time as determined by the board. The retirees sued claiming that the statute gave unconstitutional law-making authority to the board and that the board and its actuaries procured the amendment by fraud. A trial court granted motions to dismiss. On appeal, the court affirmed the trial court decision. The appeals court found that any dispute over the statute was between the legislature and the retirees. Since the board, and not the legislature, was sued there was no dispute between the board and the retirees to be litigated. The fraud allegation was not raised in the appeal and was abandoned. Lastly, the claim that freezing the COLA was a constitutional violation was not reached by the court because it was able to resolve the case without reaching the level of a constitutional analysis.

***Ohio Association of Public School Employees v. School Employees Retirement System*, 2020 Ohio 3005, 2020 WL 2537669**

IV. RE-EMPLOYMENT OF RETIREES

A. Re-employment and In-Service Distributions

IRS regulations changed in 2016 to allow liberalized rules for rehiring of retirees and allowing a continuation of retirement benefits. For public safety the rules are 20 years of service/Age 50 with 10 years of

service/Rule of 70. For non-safety employees the rules are 25 years of service/Age 55 with 10 years of service/Rule of 80.

In addition, the plan must allow in-service distributions. This will eliminate concerns regarding how long a separation is required before rehire. There will also be questions of re-enrollment versus the actuarial impact of reduced active membership.

B. Re-Employment Rules May Be Strictly Enforced

A school teacher from Elizabeth, N.J. was terminated due to a reduction in force. Approximately 10 months later, the former teacher was employed by a staffing company as a substitute teacher and assigned to schools in her former school district. Approximately one month after beginning service as a contract employee, the teacher applied for and began receiving pension benefits. Under the terms of the plan, if a member returns to employment, even as a contract employee, within 180 days of retirement, the member's benefit is suspended, the member is re-enrolled as an active participant, and the member must repay any pension benefits received. The following year, the member became a full-time teacher again. She informed the retirement plan of her re-employment and the plan suspended her benefit and demanded repayment of $32,000 of the pension paid to date. The employee challenged the suspension arguing that her employment as a contractor did not constitute employment covered by the plan. She argued further that the contractor had given her assurances to that effect. The court rejected both arguments, relying on the plain language of the statute. The court also noted that assurances from third parties not related to the retirement plan cannot create an estoppel.

***Schwartz v. Dept. of Treasury*, 2020 WL 4006621 (N.J. Super. 2020)**

C. Estoppel Limits Amount of Repayment

An education employee retired in June 2014 with the understanding that her retirement would be effective in July. Under state law, the

employee could not accept new employment until the retirement became effective. Due to delays in the pension fund, her employment actually became effective in August, despite the check saying her retirement was effective in July. In August, the retired employee accepted a new position with a different education agency. Some 2 years later, the pension fund audited the employee's account and determined that since her check was first issued in August, by accepting employment in August she was liable to forfeit 2 years of salary. A hearing officer found no material fault on the part of the employee but the board of trustees rejected those findings. On appeal, the court found that principles of equitable estoppel applied to the unique facts of the case and reduced the six figure forfeiture to a two month period.

***Golden v. Board of Trustees*, 2022 WL 2920061 (N.J. Super. 2022)**

D. Court Distinguishes Casual Labor From Re-employment

A former legal secretary in the Kentucky state government also worked on an occasional basis as an usher in the city arena where she lived. Following retirement she continued to do the occasional ushering job. In total, she had earned $300 post retirement. The Kentucky Retirement Systems (KRS) determined that the retiree had violated Kentucky's "double dipping law" and demanded a return of $20,000 in retirement benefits. A hearing officer found in favor of the retiree but the board of trustees rejected that recommended order. On appeal, the court found for the retiree noting that the overarching principle of judicial interpretation is use "common sense." The court found that the forfeiture demanded by KRS would lead to an absurd result. The work as an usher pre-existed retirement and played no part in the determination of her pension benefits. The double dipping law was to prevent a retiree of state government from also holding a full time job with state government. Under these facts, that legislative intent was not implicated and judgment was held for the retiree.

***Ky. Retirement Sys. v. Wagner*, 2022 WL 1592814 (Ky. App. 2022).**

V. DISABILITY CASES

A. Resignation Ends Plan Membership

A bus driver left employment after 24 years for reasons unrelated to disability. Following a collision the driver submitted an irrevocable letter of resignation after causing an accident with another bus that resulted in her being charged with driving under the influence. The driver later filed an application for disability retirement. Because her employment was terminated for reasons other than disability her membership in the pension system ended and the disability application was properly denied.

***Rooth v. Board of Trustees*, 472 N.J. Super. 357 (2022)**

B. Disciplinary Removal Prevents Disability Application

An investigator for New Jersey public defender's office sustained injuries in an on-duty car accident resulting in several surgeries. The employee was diagnosed with a major depressive disorder. In the years that followed, the employee had a number of disciplinary incidents that resulted in her discharge. Ten years after her removal, the employee filed for accidental disability retirement. Before a final hearing on her application, the employee reached an agreement with the employer that it would withdraw the removal if she resigned and agreed not to seek re-employment. On the basis of that agreement, the pension board denied her application on the basis that her inability to work was due to her resignation and not her accident. Denial of the application was upheld

Cole v. Board of Trustees, Public Employees' Retirement System, 2022 WL 2309546 (N.J. Super.Ct.App.Div., 2022)

C. Departure from Prescribed Course of Treatment Must be For Specific Disease

The decision of a Judge of Compensation Claims that a deputy sheriff departed from his prescribed course of treatment was reserved by the Appeals court due to the employer's failure to establish that sheriff's heart disease was worsened by his failure to continue treatment for other conditions. The deputy sheriff was diagnosed with heart disease and sought compensation under Section 112.18, Florida Statutes (the "Heart Bill"). His employer argued that the sheriff's material departure from his prescribed course of treatment triggered the application of the "reserves presumption" and so the sheriff was not entitled to compensation under the Heart Bill. In order for the reverse presumption to apply, the sheriff must have materially departed from the treatment for the same condition for which he seeks compensability. Therefore, while the sheriff did materially depart from treatment for hypertension, high cholesterol, obesity and other conditions that may have contributed to his heart disease, those conditions were separate from the claimed condition of heart disease.

***Tiburcio v. Hillsborough County Sheriff's Office/Commercial Risk Management, Inc*., 2022 WL 3441454 (Fla)**

D. Evidence of Elevated Blood Pressure on Pre-Employment Physical Negates Heart Bill Presumption

A law enforcement officer was denied compensation under the Heart Bill due to evidence of high blood pressure on his pre-employment physical. The incident was never followed up on and the officer was cleared to begin work. The officer was diagnosed with essential hypertension 14 years later and his claim denied. The officer argued that the lack of diagnosis of hypertension on his pre-employment physical should allow him to receive compensation. In affirming the decision of the Judge of Compensation Claims, the Appeals Court reasoned that under the statute, "any evidence" of hypertension is sufficient for disqualification.

***Lakin v. Hernando Country Sheriff's Office/Florida Sheriffs Risk Management Fund,* 336 So.3d 54 (Fla 1st DCA, 2022).**

E. Military Disability Benefits Not Subject to Equitable Distribution

The Florida Appeals Court held that military disability benefits differ from military retirement benefits and so are not subject to equitable distribution. The marital settlement agreement provided for equitable distribution of the husband's military retirement. Military retirement requires 20 years of service. Husband received military disability benefits after only 16 years and 9 months of service. As a result, the military disability benefit is exempt from the definition of disposable retired pay and so is considered non-taxable and is not subject to equitable distribution.

***Martin v. Martin*, 2022 WL 3441473 (Fla)**

F. Prior Traumatic Event Not Considered Pre-Existing Condition in PTSD Diagnosis

An Arizona police officer who began his employment with the city from 2002-2010, was rehired in 2013. During his first term of employment, the officer experienced a traumatic incident in the line of duty. The officer underwent an evaluation with the medical board prior to his 2013 re-employment which showed no evidence of pre-existing mental or physical conditions. In 2016 and 2017, the officer began to experience day dreams in which he relived elements of the traumatic event that occurred during his first employment. The mental symptoms worsened and he was diagnosed with PTSD and found unfit for duty. The officer applied for an accidental disability pension and was denied based upon the Board's finding that his PTSD diagnosis was a result of the traumatic incident that occurred during his first employment term. On appeal, the court pointed out that the designated physician opined that the earlier incident cannot be said to be a pre-existing condition on its own because it did not materially impact the officer's daily functioning. While the earlier event may have been a contributing factor, it was "his repeated exposure to traumatic events on the job during his second term of employment… [that] created the environment where [his]

reaction to these stressors would eventually intensify and become the full-blown syndrome of PTSD." The court reversed and found the Board abused its discretion by substituting its own understanding of PTSD for that of medical experts.

***Russell v. City of Sierra Vista Public Safety Personnel Retirement System Local Board*, 2022 WL 3711440 (Arizona)**

G. Non-Work Death Direct Result of Prior Work-Related Injuries

Under the Pennsylvania Emergency and Law Enforcement Personnel Death Benefits Act, claimants are eligible for a $100,000 death benefit if the death was service connected. While working as a police officer for the City of Philadelphia, the officer was injured in a motor vehicle accident while on duty in 2014, suffering a concussion and injuries to his neck and back. The officer did not return to work following the incident. He was treated with opioid pain medication, including a fentanyl patch. In 2016, due to symptoms suffered as a result of prior injuries and treating medication, the officer fell in his home and injured his arm, requiring surgery. The officer was prescribed hydromorphone to treat post-surgical pain. Two days following his discharge from the hospital, the officer was found unresponsive and ultimately died at the hospital. His cause of death was listed as "intoxication by the combined effects of hydromorphone, oxycodone and fentanyl therapy from chronic and post-surgical pain." His wife applied for death benefits on his behalf but was denied based upon the finding that his death was too far removed from the service-related injury he sustained in 2014. On Appeal, the Court found that the wife's testimony and documentary evidence did indeed establish a connection between the officer's work injury in 2014 and his death in 2016 and so death benefits were appropriate. She argued that but for his injury in 2014, the officer would not have had oxycodone and fentanyl in his bloodstream when he took the hydromorphone, causing the fatal combination. As a result, the officer's death was a direct result of the injuries sustained from his work-related incident in 2014.

***Diaz on Behalf of Estate of Diaz v. Department of General Services*, 2022 WL 3363663 (Penn)**

H. Board's Decision to Deny Line-of-Duty Benefits Overturned Due to Determination Under the Manifest Weight of Evidence

A decision to deny line-of-duty benefits was overturned when the Court found that the Board's determination went against the manifest weight of evidence. The officer was injured while subduing a suspect weighing approximately 250-300lbs. The officer filed a formal injury report and was sent to a local clinic for treatment. An MRI revealed a small tear to the labrum in his shoulder and a torn labrum in his right hip. While receiving treatment from his primary care physician, the doctor noted that the officer's medical history included a herniated disc L5. The officer saw a number of providers for low back pain, but was ultimately cleared to return to work with no restrictions. Approximately 4 years later, the officer applied for disability benefits based upon lumbar or orthopedic conditions. The officer underwent three IMES. Because the IME providers opined differently, the Board sought the opinion of a fourth provider as they could not determine whether the disability was job related. Ultimately, the final provider opined that the disability was not service connected because he had a pre-existing history of disc herniation and his symptoms occurred after that injury. While the Board is able to award more weight to the opinion of one medical provider over the others, on the appeal, the Court found that in this case, "the record does not show evidentiary support for the agency's determination." Notably, the Board failed to consider that the officer's ability to work different jobs within the police department was a reflection of accommodations to his condition, not a lack of impairment.

***Snarski v. Board of Trustees of Schiller Park Police Pension Board*, 2022 IL App (1st) 211184-U (Wash. Ct. App).**

VI. FORFEITURE OF BENEFITS

A. Off Duty Assault Warrants Forfeiture

An off-duty Chicago police officer attacked a patron at a local bar. When the bartender confronted him, he assaulted her. When confronted by a different patron he threw garbage on the floor and left. He admitted his conduct to a fellow officer. A friend of the officer sought to dissuade the bartender from testifying against the offender. The offender said he did not fear arrest because he was a police officer. Shortly thereafter, he was arrested and convicted of aggravated battery. The Board determined that his conduct had a direct connection to his position as a Chicago police officer and forfeited his retirement. A trial court reversed the Board. On appeal, the appellate court found that the offender's behavior was based on his belief that he could act without regard to the consequences because of his position. Further, the court found his attempted use of a fellow officer to dissuade the victim further connected the matter to his employment. The forfeiture was upheld.

***Abbate v. Retirement Board,* 2022 Ill. App.(1st) 201228 (6/6/22)**

B. Withdrawal of Contributions Ends Survivorship Claim

A former Washington state patrol officer who was in disability status committed a felony. As a consequence he withdrew his employee contributions. The former member and his spouse filed a declaratory relief action to establish the spouse's right to a survivorship benefit should they remain married and the member predeceased his wife. The Department of Retirement Systems took the position that the spousal benefit was dependent on the former employee remaining a member of the system. By withdrawing his contributions, he relinquished his rights in the system including the ability to leave a spousal survivorship benefit. By withdrawing his contributions, the member's pension account was reduced to zero and any survivorship

would likewise be zero. By terminating his membership, the employee effectively surrendered any ability to provide a survivorship benefit.

***Merino v. State, Dept of Retirement Systems,* 21 Wash. App.2d 1025 (2022)**

C. Forfeiture Based on Police Officer's Murder of Ex-Wife Upheld

In 2009, an Illinois police officer was charged with the 2004 murder of his ex-wife. He was convicted and sentenced to 38 years in prison. Prior to his indictment, the officer retired and began receiving a regular service pension benefit. Following the officer's murder conviction, the Board began an investigation. The facts in the murder trial revealed that the officer paid another person to "take care of" his former wife. The payment occurred while the killer was doing a ride-along with the officer. On the day of the murder, the officer called a locksmith to open his now deceased wife's door for a wellness check. The officer was present, in uniform, with the locksmith. The pension board ultimately concluded that the officer used his training and police skills to plan and commit the murder. The board found this was a sufficient nexus with his job to warrant forfeiture. A trial court upheld the board decision and the member appealed. On appeal, the court found that the Board's conclusion that member used his position to orchestrate the murder, the finding of his wife's body, and efforts to misdirect the murder investigation all were directly related to his job as a police officer were based on competent evidence and the forfeiture was upheld.

***Peterson v. Board of Trustees*, 2022 Illinois App. 210100-U (8/11/2022)**

D. State Law on False Report to Law Enforcement Did Not Equal Federal Crime of Lying to FBI

A municipal judge was being investigated over ties to a businessman. The judge lied to the FBI concerning the relationship and was charged with two counts of making false statements to a federal agent. The judge pled guilty and resigned. He applied for his state pension. The retirement board forfeited his benefit on the basis that his federal plea

was the equivalent crime to a Pennsylvania law prohibiting making false police reports. The member appealed and a state appeals court upheld the forfeiture. On discretionary review by the State Supreme Court, however, the board decision was reversed. The Supreme Court held that what mattered between the two laws were the elements of each distinct crime and not to try and fit the facts of one into the other. Finding forfeiture laws should be strictly construed, the Supreme Court expressly held that if pension boards and lower courts deviate from a strict comparison of the elements of each crime, including scienter (evil intent), they commit legal error. The Supreme Court noted that the state law required an intent to falsely report and the federal crime did not. As such, they were not deemed comparable and the forfeiture was reversed.

***O'Neill v. State Employees' Retirement System*, __A3d__, 2022 WL 3363043 (Pa. 8/16/2022)**

E. Workers' Compensation Fraud Warrants Pension Forfeiture

Former corrections officer was found to be disabled following a work-related injury and warranted a disability retirement. He was also receiving workers' compensation claiming he was incapable of any employment. Despite certifying that he was not working or able to work, the employee was working at a car dealership owned by his wife. The Boston retirement board revoked his pension finding that although the crime actually occurred after retirement, it was directly related to benefits being received based on a claimed work-related disability. The member was found to have illegally received nearly $500,000 in injury-related benefits despite secretly working. The member's appeals were rejected at several levels of the court system and the matter finally made its way to the state supreme court. The court found that the forfeiture should be upheld as there was a direct nexus between the fraudulent payments and his job. The fact that the crime actually occurred two years later did not, in the court's opinion, disconnect the offense from his prior public employment and the board properly forfeited his benefits.

***Mahan v. Boston Retirement Board*, 490 Mass. 604 (9/6/2022)**

VII. HOT TOPICS

A. Crypto or No Crypto

While not binding on a governmental retirement plan, the U.S. Department of Labor, responsible for overseeing private sector pension plans, including Taft Hartley plans, has issued a strong caution not only about direct investment in crypto but in investment in collective funds where crypto currency was the underlying strategy. The caution has risen to the level of suggesting a breach of fiduciary duty.

B. ESG - Environmental, Social, Governance

Only one state appeals court has addressed the issue of ESG (at that time 40 years ago called "social investing."). The overreaching question is whether the investment strategy is in the best interest of the members and beneficiaries. Some states (Texas and Idaho, for example) have prohibited investments in companies which boycott fossil fuels. California, on the other hand, has encouraged the state retirement systems to divest of thermal coal.

What if the issue is considered an existential threat, such as sea rise in low-lying coastal areas? What about investing in an economically threatened employer such as occurred in New York in the 1970s?

Is there a First Amendment question? The U.S. Supreme Court held that a university board of trustees had a first amendment right to censure a trustee who used social media to undermine board decisions.

***Houston Community College System v. Wilson,* 142 S.Ct. 1253 (3/24/2022).**

VIII. CONCLUSION

IF YOU HAVE ANY QUESTIONS OR COMMENTS CONCERNING THIS PRESENTATION, CONTACT ROBERT D. KLAUSNER, ESQUIRE, KLAUSNER, KAUFMAN, JENSEN & LEVINSON, 7080 N. W. 4TH STREET, PLANTATION, FLORIDA 33317, (954) 916-1202, FAX (954) 916-1232, E-MAIL bob@robertdklausner.com. Visit our website www.robertdklausner.com.

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