

LEGALINSIGHTS

FOR PENSION BOARDS

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Surviving spouse benefits exempt from collection

by Ryan R. Morton

Attorneys are paid to be creative. Clients expect their lawyers to come up with clever arguments to win their cases. For instance, where an Illinois statute plainly establishes the law, an advocate might argue that a federal court case should preempt the state statute, even if the state law seems clear. It is the responsibility of judges, then, to see through such distracting arguments and uphold the law.

That basically explains how a recent appeal was handled on the issue of surviving spouse pension benefits. In *Chicago Police Sergeants' Association, Policemen's Benevolent & Protective Association, Unit 156A v. John Pallohusky*, 2017 IL App (1st) 162822, the Association argued that a United States Supreme Court decision allowed creditors to reach the pension benefits of a police officer's late wife. The appellate court, however, decided Illinois law clearly prohibited that practice, so the Supreme Court case had no bearing.

John Pallohusky and his wife, Mary O'Toole, both served as Chicago police officers for nearly two decades. When she died in 2010, Pallohusky received a "widow's annuity" of about \$780 per month, after taxes and insurance. The widow's annuity under Article 5 of the

Illinois Pension Code (40 ILCS 5/5-101) goes to the surviving spouses of police officers who retire or die while in service. The annuity continues for the life of the surviving spouse, but it cannot be withdrawn in a lump sum nor accessed outside of monthly disbursements.

In 2013, the Association obtained a court judgment against Pallohusky based on unrelated claims, wherein Pallohusky owed the Association nearly \$700,000. Hoping to collect on its judgment, the Association filed a motion to force Pallohusky to turn over his widow's annuity. Pallohusky argued that those funds could not be touched to satisfy a debt, under both the Illinois Pension Code and the Illinois Code of Civil Procedure.

The Association, on the other hand, contended that his wife's pension was not his own retirement benefit, so those funds should not be exempt from collection. The district court ruled in favor of the Association, and Pallohusky appealed.

The appellate court agreed with Pallohusky and overturned the lower court's decision, based solely on statutory analysis. The Illinois Pension Code provides, "[A]ll pensions, annuities, refunds or disability benefits

Court revisits the meaning of the phrase "act of duty" when considering an application for Article 3 disability pension benefits

by Ericka J. Thomas

Over the last thirty years, Illinois courts have spent a significant amount of time defining the phrase "act of duty" as used in Article 3 of the Illinois Pension Code. Whether a police officer was performing an "act of duty" when he or she was injured will determine whether the officer is awarded line of duty or non-duty disability pension benefits.

In the recent case of *Martin v. Board of Trustees of the Police Pension Fund of the Village of Shiloh*, 2017 IL App (5th) 160344, the Fifth District Appellate Court clarified that the analysis should focus on the *capacity* in which the officer is acting at the time of injury and *not* the precise mechanism of injury.

The officer in *Martin* was returning to the police department from the local courthouse after performing a variety of activities, including filing traffic citations and obtaining subpoenas for an ongoing investigation. While stopped at a stoplight in a squad car, the officer was rear-ended by another vehicle and sustained cervical spine injuries that

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Act of duty

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became permanently disabling. The officer applied for line of duty disability pension benefits. The Village was granted leave to intervene in the pension proceedings.

After determining that the officer was not performing an “act of duty,” the Board concluded that the officer was entitled only to non-duty disability pension benefits. The Board commented that the officer was not performing an “act of duty” involving “special risk” because he had completed his business at the courthouse and was simply returning to the police department as a passenger in a squad car at the time he was struck; such an accident is experienced by regular citizens every day.

The officer then filed a complaint requesting administrative review. The trial court reversed the Board’s decision and awarded the officer line of duty disability pension benefits.

On appeal, the Board argued that its decision was correct and that the officer was not performing an “act of duty,” as defined in the Illinois Pension Code. Note that the court relied on the definition of “act of duty” found in Article 5 of the Illinois Pension Code, which governs Chicago police pensions.

The Fifth District affirmed the reversal of the Board’s decision and cited to the Illinois Supreme Court case of *Johnson v. Retirement Board*, 114 Ill.2d 518 (1986), and its progeny as the basis for its decision. The *Johnson* case involved a police officer who was crossing an intersection to assist a

citizen when he slipped and permanently injured himself. The Illinois Supreme Court concluded that the officer’s actions in *Johnson* were an “act of duty” because the officer was discharging his sworn duties by responding to a citizen’s call.

The court concluded that the relevant inquiry is the capacity in which the officer was acting and not the precise way the officer was injured.

As in *Johnson*, the Fifth District noted that the officer had been performing duties at the courthouse that are not delegated to members of the general public and, because he was on duty and in a squad car at the time of the accident, he was subject to

attend to any other police calls and responsibilities that might arise. The court continued that a police officer in a squad car “...must have their attention and energies directed towards being prepared to confront any eventuality.” The court concluded that the relevant inquiry is the capacity in which the officer was acting and not the precise way the officer was injured.

Although the *Martin* case reaffirms the *Johnson* rule of law, the court emphasized that very subtle factual differences could have resulted in a different outcome. As with all pension proceedings, it is important for pension boards to consult with their counsel to help navigate this complicated legal area. ■

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- Business formation and succession planning; and
- General civil and commercial litigation.

If you have a question about a legal issue involving these areas of law, Ottosen Britz has an attorney who can assist you.

Social investing: considerations for pension fund fiduciaries

by Brian J. O'Connor

A recent article in the *Los Angeles Times* focused on certain recent “social investing” issues that have reached some of the largest public pension systems in the United States, imposed by current public opinion and values.

In the article, “Political Road Map: Trump and gun investments spark debate for California pension funds” (*Los Angeles Times*, November 5, 2017), a letter last summer from U.S. Representative Ted W. Lieu to the California Public Employees’ Retirement System (CalPERS) is highlighted.

In the letter, Representative Lieu requested that CalPERS divest its investment in the CIM Fund III which owns the Trump SoHo hotel and condominium development. Representative Lieu suggested that ownership in the development essentially creates a conduit from state pension funds to the President, thereby violating the Domestic Emoluments Clause of the U.S. Constitution.

Other individuals are also pushing CalPERS to cancel investments in the oil and gas industry, following a 2015 divestment in coal companies. In fact, according to the article, divestment decisions by CalPERS have already shrunk the fund’s investment portfolio by about \$8 billion, the largest part being the fund’s divestment from tobacco companies.

Indeed, every few years there is pressure to use public pension funds to make a political statement or effectuate social change. Past examples include

the aforementioned tobacco investments, as well as companies doing business in countries with a history of human rights violations. After the Sandy Hook shooting, teacher retirement systems across the country sought to divest from firearms companies.

Pension fund trustees must remember that this is not a personal choice; their fiduciary obligations require that the choice be made for the benefit of the fund’s members

The Illinois Pension Code imposes limitations on the types of investments that may be made by firefighter and police pension funds. However, these limitations generally do not address the recent phenomenon of investments based upon social or ethical considerations. Thus, fund trustees are left with little guidance as to how to balance their fiduciary obligations with the goals of social investing.

Nevertheless, in Illinois, some investment considerations that began as matters of public concern and values are now incorporated into law, including limitations on investments with the Islamic Republic of Iran (40 ILCS 5/1-110.15 and 1-110.16), the Republic of the Sudan (40 ILCS 5/1-110.6 and 1-110.16), and, more recently, companies that boycott the State of Israel (40 ILCS 5/1-110.16). While these provisions impose limitations on the statewide pension systems in Illinois, none of these

provisions are applicable to Article 3 and 4 funds.

In any event, making a decision to divest based upon emotion and politics may cause the fund to lose money. Moreover, not every member of a fund’s board -- let alone the fund -- may have the same feelings on the topic. Pension fund trustees must remember that this is not a personal choice; their fiduciary obligations require that the choice be made for the benefit of the fund’s members.

So what should pension fund trustees do? First, and foremost, they must look at the economic consequences to the fund of a divesture. They must seek the advice of investment experts before making any decision. They should ask those experts what information the experts are using to make their recommendations, and then review the information themselves. Finally, they should document the process, and make a decision that is in the best interests of the fund and is separate and apart from their own personal interests and beliefs.

In summary, a board considering social investing would be well-advised to thoroughly research the potential impact each investment or divestment might have on the Fund (and provide for indemnification of the Board, consultants and employees (40 ILCS 5/1-107)) before expanding or contracting investment considerations beyond those imposed or permitted by law to those based on public opinion and values. ■

Surviving spouse

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granted under this Article, and every portion thereof, are exempt from attachment or garnishment process and shall not be seized, taken, subjected to, detained or levied upon by virtue of any judgment.” (40 ILCS 5/5-218) Note that similar provisions exempting pension benefits from garnishment are found in both Article 3 (40 ILCS 5/3-144.1) and Article 4 (40 ILCS 5/4-135) of the Illinois Pension Code.

Additionally, the Illinois Code of Civil Procedure states that a debtor who has an annuity due to him under the Pension Code cannot have that annuity reduced because of a judgment (735 ILCS 5/12-1006(a)). The court determined both statutes clearly provided that pensions and annuities are exempt from collection.

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To support its position, the Association tried to convince the court that the widow’s annuity was more like an individual retirement account (IRA) than a public pension retirement fund. The Association cited *Clark v. Rameker*, 134 S.Ct. 2242 (2014), in which the U.S. Supreme Court determined that an inherited IRA does not have the characteristics of a retirement account, so it could be garnished.

Similarly, Pallohusky’s annuity payments are not from his pension and are being disbursed pre-retirement. Therefore, the Association argued, those payments were not designed for retirement, which makes them non-exempt.

The appellate court rejected the Association’s interpretation of *Clark*. The Supreme Court held that inherited IRAs are not exempt from garnishment because those accounts allow withdrawal at any time and for any purpose. The widow’s annuity, however, cannot be withdrawn in full, and it terminates when the surviving spouse dies.

More importantly, in *Clark*, the court was considering a type of retirement account that did not clearly fall within an exemption. The ambiguity required a judicial determination. In

this case, however, two statutes explicitly stated that public pension payments could not be accessed through collection. The appellate court had no reason to look for other interpretations of relatively clear laws.

Although the Association’s attorneys made a decent argument that the widow’s annuity should be accessible by creditors, Illinois statutes already prohibited such a practice.

Thanks to this case upholding the statutes as written, public pensioners - and future recipients - can rest assured that their benefits will not be touched through garnishment or collection, at least until those funds are disbursed. ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, Ltd.’s newsletter, ***Legal Insights for Pension Boards***, is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

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