LEGAL INSIGHTS
FOR PENSION BOARDS
OTTOSEN BRITZ KELLY COOPER GILBERT & DiNOLFO, LTD.

Volume 25, No. 2 -- Spring 2018

Is the denial of a request for continuance an abuse of discretion?

by Michael B. Weinstein

Under what circumstances, if any, can a pension board deny a petitioner's request for an initial continuance? This was the question that was before the court in *Robelet v. Police Pension Fund of the City of Crystal Lake*, 2017 IL App (2d) 170306. In order to fully appreciate the court's decision, a thorough review of the facts of this case is essential.

Victor Robelet was employed as a police officer for the City of Crystal Lake. On May 6, 2015, he applied for a line-of-duty disability pension. A short time later, he was terminated from his job. Initially, Robelet was represented by attorney Raymond Garza in both his pension application as well as a grievance arbitration with respect to his termination. On July 21, 2015, the City filed a motion to intervene in the disability proceeding, which was granted over Robelet's objection. Almost a year later, the Board sent Garza and the City copies of documents on which it intended to rely at hearing, subject to any objections.

Subsequently, on July 9, 2016, Attorney Thomas McGuire sent a letter to the arbitrator in the grievance arbitration, stating that he had been retained by Robelet. Due to a "volume of professional commitments," he requested that the arbitration hearing be postponed from August 4 and 5, 2016 to any date after September 14, 2016. On August 4, 2016, McGuire sent a letter to the Board's attorney, Richard Reimer, asking for a continuance of the August 15th disability hearing date, due to ongoing medical issues.

The following day, Reimer responded to McGuire, pointing out that the Board had "made numerous efforts to schedule the pension hearing for a time agreeable to all parties and counsel" to no avail. Thus, the hearing would commence, as scheduled, on August 15th, although the Board would consider the request for continuance at the beginning of the hearing. Nevertheless, the Board's attorney warned counsel that if the continuance request was denied, the hearing would proceed on that date.

On August 7, 2016, Garza sent an email to McGuire in which he discussed his "thoughts and impressions" concerning his hearing strategy. He also told McGuire that he was available to answer any questions that the attorney might have. Three days later, the City sent McGuire copies of all the documents and videos that it had produced with respect to Robelet's case. On August 12, 2016, McGuire emailed a formal motion to continue the matter, indicating that although he had been experiencing some health problems, he anticipated that he would be ready to proceed by September 15, 2016.

On August 15, 2016, the day of the hearing, McGuire appeared without his client. The Board's attorney stated that there had been numerous attempts to schedule the hearing during June or July but that none of the proposed dates would work for Garza. Thus, on July 25, 2016, the Board sent notice to all concerned that the hearing would be held on August 15 and 17, 2016.

The City's representative noted that it had sent McGuire all of its documents on

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Court creates dilemma by remanding disability rehearing yet removing three pension trustees

by Shawn P. Flaherty

The Illinois Appellate Court for the Second District recently issued an opinion vacating the Kane County Circuit Court's ruling to uphold a pension board's decision to deny an application for disability benefits in *Naden v. Firefighters' Pension Board of Sugar Grove Fire Protection District*, 2017 IL App (2d) 160698. The appellate court also remanded the matter back to the pension board for a rehearing but excluded three of the five pension board members from participating in the rehearing due to the potential for bias and conflict of interest.

The appellate court also denied the pension fund's petition for rehearing without comment or direction from the court on how the pension fund is to conduct a rehearing with only two pension board members and no quorum. This matter currently awaits review before the Illinois Supreme Court on a petition for leave to appeal.

A quick review of the factual background is in order. Sara Naden is a lieutenant employed by the Sugar Grove Fire Protection District. In May 2014, Naden filed for a line-of-duty disability pension (or in the alternative, a non-duty disability pension) from the Sugar Grove Firefighters' Pension Fund based upon mental conditions, which she alleged resulted from her employment with the Fire District.

The applicant previously expressed concerns about her ability to cope with some of her co-workers, and she sought a sabbatical from the Fire District to deal with

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related health and stress issues. The Fire District allowed Naden to take a leave of absence followed by FMLA leave to receive treatments. In the meantime, the fire chief requested that Naden provide information about her condition, as well as a written summary of her allegations against her co-workers so he might investigate the matter. In April 2014, Naden provided a 16-page document that detailed several allegations of misconduct from numerous Fire District employees over a five-year period.

Soon thereafter, the fire chief sought to question Naden about her allegations and provided her with rights under the Firemen's Disciplinary Act (50 ILCS 745/1 *et seq.*). Naden produced a medical opinion that she was not mentally fit to participate in the Fire District's investigation. To this date, no action has been taken on Naden's complaint because of her inability to participate. Naden subsequently filed an administrative action before the Equal Employment Opportunity Commission, which was subsequently dismissed.

Following a full disability hearing, the pension board unanimously concluded that Naden was not disabled as a matter of law and did not meet the criteria to receive any disability pension. The circuit court affirmed the pension board. However, the appellate court, on its own accord, ruled that Naden did not receive a fair hearing before the pension board because three of the five members of the pension board were named as "antagonists" in Naden's complaint to the Fire District.

The court stated that there was something of a "running controversy" between Naden and the three trustees, which increased the potential for a risk of bias from these three decisionmakers. The court ruled that "the degree of bias rendered the Board's decision unsustainable," and it therefore vacated the decision.

It did not matter to the appellate court that Naden and her legal counsel did not raise the issue of bias of these three board members either during the pension hearing or on appeal. The court disregarded the argument that Naden waived the ability to raise that issue, citing United States Supreme Court authority that judicial-disqualification claims are a "structural error" that may be addressed at any time in litigation. See *Williams v. Pennsylvania,* 136 S. Ct. 1899, 1909 (2016).

> ***How does a pension board conduct a disability hearing when a majority of its members have been excluded from participating?***

The appellate court was critical of some of the medical evidence relied upon, to the extent that the physicians who provided independent medical examinations were too focused on Naden's ability or inability to perform her job duties for other fire departments. The court cited to the requirement of Section 4-110 of the Illinois Pension Code that the firefighter was incapable of rendering "service in the fire department," which the court held meant the same department not another department (40 ILCS 5/4-110).

The court also addressed several other ancillary points raised by the parties in their pleadings. Several of these points are instructive to pension boards in how to conduct disability hearings:

- The court upheld the pension board's decision to grant a motion for leave to intervene from the firefighters' union. The court held that it was not an abuse of discretion for a pension board to allow a firefighters' union a limited right to intervene in a pension hearing. In this particular case, the firefighters' union did not materially participate in the disciplinary hearing following the motion to intervene because none of the union members other than Naden were called to testify at hearing.

- The court denied Naden's request to compel the pension board to release the verbatim audiotapes of the closed session deliberations on her disability determination. Citing Section 2.06 of the Open Meetings Act (5 ILCS 120/2.06), the court agreed with the pension board and circuit court that the tapes "shall not be open for public inspection or subject to discovery in any administrative or judicial proceeding" other than an action to enforce the Open Meetings Act.

- The court also ruled that the pension board acted correctly in denying Naden's request to testify in closed session. The court found that allowing such testimony in closed session would have violated Section 2 of the Open Meetings Act and agreed with the pension board that the "personnel" exception (5 ILCS 120/2(c)(1)) did not apply because the pension board was not Naden's employer.

It is interesting to note that the appellate court did address two Open Meetings Act issues raised by the parties, but its order to remand this matter to rehearing has now created a third Open Meetings Act issue that has not been squarely addressed in any reported court decision in Illinois: How does a pension board conduct a disability hearing when a majority of its members have been excluded from participating in the remand?

This is an important matter which this author and this firm has been contemplating for several months now. The matter has not yet been resolved. Stay tuned. ■

Marital settlement agreements must address unforeseen disability benefits

by Ericka J. Thomas

The Illinois Pension Code attempted to make division of firefighter pension benefits a little less complicated by creating uniform processes and forms commonly known as QILDROs ["Qualified Illinois Domestic Relations Order"]. However, in the recent case of *In re Marriage of Farrell and Howe,* 2017 IL App (1st) 170611, an unanticipated on-the-job injury following entry of a QILDRO order raised a previously unaddressed legal concern.

In *Farrell*, a couple divorced after nineteen years of marriage. The husband was employed by the City of Chicago as a firefighter. Under the marital settlement agreement, the wife was to get half of the husband's pension payments in exchange for waiving maintenance, alimony, and spousal support. The husband executed all necessary documents in 2010. Subsequently, in 2013, the husband was injured on the job and began receiving disability pension benefits. In 2016, when the husband was sixty-one years old, the wife attempted to enforce the marital settlement agreement by claiming that she was entitled to half of the husband's disability benefits.

The circuit court found in favor of the husband and determined that the wife was not entitled to any of the husband's disability benefits. Under Article 6 of the Illinois Pension Code, mandatory retirement age for City of Chicago firefighters is sixty-three years of age. As such, the husband was not technically entitled to receive his retirement annuity until he turned sixty-three. The circuit court determined that the marital settlement agreement was unambiguous that the parties intended the wife to receive half of the husband's retirement annuity and not any of his disability pension benefits. Once the husband turned sixty-three, she would then be entitled to half of the annuity payments.

The First District Appellate Court affirmed the circuit court's determination and said it was clear that the parties intended the word "pension" to mean the husband's benefits upon retirement and not disability benefits received prior to the age of retirement. The court reasoned that, since the wife had waived any claims of maintenance and spousal support, she also waived her right to any disability pension benefits the husband received because those benefits replaced the husband's income until he turned sixty-three and began receiving his retirement pension benefits.

The court noted that Article 6 was unique from other sections of the Illinois Pension Code in that it provides for disability pension benefits for firefighters up until the age of mandatory retirement, and then the firefighter would begin to receive a retirement pension. Article 6 does not allow a firefighter to continue to receive disability pension benefits in lieu of retirement pension benefits, unlike some of the other articles of the Illinois Pension Code. Accordingly, the wife would still be entitled to her portion of the husband's retirement pension benefits when he turned sixty-three as agreed upon in the marital settlement agreement.

In the fire service, unforeseen circumstances such as on-the-job injuries are common and should be considered by both parties when marital settlement agreements are being drafted. Divorce attorneys and their clients must consider the article of the Illinois Pension Code involved, and make the parties' intents clear and concise in divorce agreements in the event such an "unforeseen" issue arises. ■

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August 10th. McGuire responded by stating that he had been out of his office quite a bit and had therefore not viewed the documents. He also stated that he was unsure whether he had all of the documents that the Board had sent to Garza, to which the Board's attorney responded that the Board sent Garza a USB drive with all the documentation. McGuire then acknowledged that he had received a USB drive from Garza. McGuire went on to state that he had agreed to represent Robelet on August 3, 2016 after having first urged Robelet to stay with Garza. He conceded that he took a "calculated risk" in instructing Robelet to not appear at the hearing so that it would be more difficult for the Board to proceed.

McGuire told the Board that his health was not good. He stated that he took the case because "hope springs eternal" that his health would improve and because Robelet's insistence that he wanted McGuire to be his attorney was "somewhat of an ego trip." McGuire concluded that he was willing to provide an affidavit concerning his medical condition.

Ultimately, after a three-hour hearing on the motion for continuance, the Board voted to deny the motion. However, as a courtesy, the Board agreed to continue the hearing to the previously scheduled date of August 17th. On August 16, 2016, McGuire sent a letter to the Board, via email, asking that the Board reconsider its decision and continue the hearing for one month. The letter stated that when he returned home on August 15th, his wife reminded him that he had two doctor appointments scheduled for August 17th, one in the morning and the other in the afternoon. Attached to the letter was a notarized

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statement listing his doctors, as well as his medications.

On August 17th, the Board reconvened, only to find that neither the Petitioner nor his attorney was present. Counsel for the City located Attorney McGuire at the doctor's office and was told that neither he nor his client would be present at the hearing. In fact, McGuire told his client not to come to the hearing. In light of these facts, the City asked the Board to dismiss the Petitioner's application for disability benefits. The City's request was granted.

Subsequently, Robelet filed a complaint for administrative review. On March 31, 2017, the trial court entered an order upholding the Board's decision. Robelet timely appealed the trial court's decision. On November 15, 2017, the Illinois Appellate Court, Second District, filed an opinion affirming the Board's decision to deny a continuance. In a unanimous opinion, the court held that the decision of the Board to deny a continuance would be reviewed using an "abuse of discretion" standard. Thus, in order to prevail, Robelet needed to show that the Board had acted arbitrarily.

Robelet, again represented by McGuire, advanced two arguments on appeal. First, he argued that in denying the request for continuance the Board was improperly influenced by the police department's investigative file, concerning the incident that gave rise to his disability application. The appellate court made short shrift of this argument. It found that the exhibits in question were provided by the City, in response to a Board subpoena, and that they had been previously supplied to Garza who did not object to them. Moreover, administrative officials, such as the Board members, are presumed to be objective. Thus, a party challenging a Board's impartiality must overcome that presumption. In this case there was no evidence to support a conclusion that the Board's decision to deny the continuance was, in any way, connected to the exhibits.

Second, Robelet argued that under the facts of the case, the Board should have granted his request for a continuance. He noted that this was the first request for a continuance and was made shortly after he retained new counsel. In his view, there was no harm to the Board in granting a continuance, while he suffered great harm when his application for disability benefits was dismissed. The appellate court concluded that this argument also failed. The court reviewed the facts, noting that McGuire began representing Robelet in the grievance matter as early as July 9th. Furthermore, the Board scheduled the hearing dates on July 25th, yet the request for a continuance was not made until more than a week later, on August 4th.

The court further noted that the record reflected that McGuire had not read the documents that the City had previously sent to Garza, nor had he reviewed the Board's documents that had been provided on the USB drive. In the court's view, McGuire simply was not prepared to present Robelet's case-in-chief and so he asked for a continuance. This failure to be prepared indicated a lack of due diligence, which is not a good reason for granting a continuance. Instead, McGuire should not have taken the case. Moreover, despite his illness, McGuire was able to argue his motion for continuance for three hours. Thus, this was not a case where an unexpected and grave illness prevented an attorney from attending a hearing.

Finally, the court determined that the denial of the motion to reconsider did not constitute an abuse of discretion where McGuire's doctor's appointments had been previously scheduled but McGuire had not remembered them. However, he was able to reschedule one of the appointments on short notice indicating that the appointments were not of an emergency nature. Perhaps, most importantly, neither McGuire nor his client were present on the August 17th hearing date. Thus, the denial of the motion to reconsider, as well as the dismissal of the disability application itself, were not erroneous. The court summed up its decision by reiterating that due process requires notice and an opportunity to be heard. Robelet was notified of both the August 15th and August 17th hearing dates, yet he chose to not be present. Therefore, there was no violation of his due process rights when he chose not to participate.

What can pension fund trustees learn from this decision? First, a request for a continuance of a hearing date need not be automatically granted. Each case depends upon its own facts. Second, a pension board's decision to deny a continuance will be upheld where there is no abuse of discretion. In short, there is no such animal as an automatic continuance, even when the request is an initial request. ■

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