ILLINOIS PROFESSIONAL FIREFIGHTERS' ASSOCIATION

LEGAL & LEGISLATIVE DEVELOPMENTS

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1. LEGISLATION

Amendments to the Open Meetings Act Allowing for Remote Attendance

P.A. 101-640

Due to the ongoing Coronavirus pandemic, the last several months have seen a series of adjustments to the Open Meetings Act. These modifications began with Governor Pritzker issuing successive Executive Orders and cumulated with a permanent amendment to the Open Meetings Act effective June 12, 2020.

Under the Act as amended, a public body may hold meetings via phone, video, or other electronic attendance without the physical presence of a quorum under the following conditions:

1) The Governor or Illinois Department of Public health has issued a disaster declaration covering all or part of the jurisdiction of the public body.
2) The head of the public body determines an in-person meeting is not practical or prudent because of a disaster.
3) All members of the public body participating in the meeting must verify they can hear one another and all discussion or testimony.
4) Members of the public present at the regular meeting location can hear all discussion or testimony and all votes taken unless attendance at the regular meeting location is not feasible due to the disaster. If in-person attendance by the public is not feasible, the public body must provide alternative means for the public to hear the meetings such as using a telephone or web-based link.
5) At least one member of the public body, chief legal counsel, or chief administrative officer is physically present at the regular meeting location, unless not feasible because of the disaster.
6) All votes must be conducted by roll call of each member.
7) Notice must continue to be posted at least 48 hours' in advance of the meeting.
8) The public body must keep a verbatim record in the form of an audio or video recording of meetings held in this manner.

On April 2, 2021, the Governor issued his most recent disaster declaration. Most significantly, the disaster declaration finds "in person attendance of more than ten people at the regular meeting location not feasible." This most recent declaration runs through May 2, 2021, although it should be noted the Governor has been issuing 30 day disaster declarations in succession for some time now. As such, it should be anticipated a new disaster declaration will be issued upon expiration of the one now in effect.

Boards continue to have the option of phone/video conference meetings in lieu of an in-person meeting. Pension boards wishing to have in-person meetings must ensure less than fifty people will be present. The Governor's orders continue to require face coverings and 6 foot distancing in public places. It is anticipated pension boards wishing to hold remote attendance meetings may continue to hold meetings via phone/video conference. In order to do so, an agenda/notice must be posted announcing the meeting will be held remotely and giving the public remote attendance options. The pension board president must make a finding an in-person meeting is not practical or prudent due to

the pandemic. At least one member of the pension board must be present at the regular meeting location unless not feasible.

2. PENSION CASES

PTSD Line-of-Duty Disability Approved on Appeal for Officer Involved in Shooting where Firearm Jammed

Staford v. Bd. of Trustees of the Crest Hill Police Pension Fd., et al., 2021 IL App (3d) 190779

In unreported Rule 23 case, the Third District Appellate Court upheld the circuit court's reversal of the pension board's denial of line-of-duty disability pension benefits for an officer who developed PTSD following an on-the-job shooting incident.

Officer Staford ("Applicant") was working as a patrol officer when he and a suspect exchanged gunfire. During the incident, Applicant's gun jammed. After the incident, Applicant was hospitalized with reports of and diagnosed with anxiety. He was later diagnosed with PTSD when his symptoms worsened and took three leaves of absence.

Several years later, Applicant was placed on administrative leave while investigated for prescription narcotic use. The evaluating physician found Applicant accessed hydrocodone from multiple providers in large quantities. Applicant reported to the physician symptoms of anxiety, difficulty sleeping, nightmares and irritability following the shooting incident. Applicant was diagnosed with substance dependence and PTSD.

Applicant voluntarily resigned following the internal investigation and filed for line-of-duty and/or non-duty disability pensions. Applicant underwent three (3) independent medical examinations. Initially, the unanimous opinion was Applicant was disabled as a result of the shooting incident. The pension board then asked for supplemental opinions based upon later hospitalization reports in which Applicant was diagnosed with PTSD and major depressive disorder.

The first doctor issued two supplement reports. In the first report the doctor noted Applicant's erratic behavior was caused in part by pain medication abuse, not PTSD. In the second supplemental report, the doctor noted Applicant's PTSD disability was the direct result of the incident.

The second doctor found Applicant disabled due more to his inability to follow the code of conduct than PTSD. The doctor admitted Applicant suffered from elements of PTSD and his prognosis for sustained remission was guarded to poor. The doctor concluded Applicant's use of narcotics was not due to PTSD and that the precipitant to his 2016 hospitalization was not the shooting but rather the pregnancy of his estranged by another man.

The third doctor maintained Applicant suffered from PTSD and major depressive order caused directly by the shooting incident and found there was no evidence Applicant abused drugs prior to the shooting incident.

A fourth doctor retained by the worker's compensation carrier submitted two reports that noted Applicant was functionally effective prior to the shooting incident and was thereafter properly diagnosed with PTSD, although some symptoms could have been related to excessive narcotic use.

At hearing, Applicant's psychologist testified regarding his PTSD diagnosis, his prescription medication use and treatment session history. The psychologist provided a written summary which noted Applicant did not have symptoms prior to the shooting incident.

At hearing, the board reviewed Applicant's primary care physician's records which indicated he came to her after the shooting incident with complaints of insomnia and nightmares. Applicant was prescribed an anti-depressant and sleep aid. It was noted his symptoms increased as did his anti-depressant dosage.

At hearing, Applicant testified as to the onset and status of his symptoms along with a timeline of his post-incident work history, leaves of absence and sick leave usage.

In denying the line-of-duty benefit, the board concluded Applicant was disabled but not because of the shooting incident. The board focused on the reports of two IME doctors as "most persuasive" and discounted the third IME doctor's report as "less persuasive" because they did not address the intervening cause of prescription medication abuse as a precipitant to Applicant's mental health. Additionally, the board ignored Applicant's psychologist's opinion on causation because he was not a medical doctor and did not reference Applicant's prescription drug abuse. Last, the board found Applicant evasive and/or dishonest regarding his drug use.

On administrative review, the circuit court reversed the board's decision finding it against the manifest weight of the evidence because each IME physician found Applicant disabled as a result of the shooting incident. The pension board appealed.

On appeal, the Court noted four (4) medical professionals initially found Applicant unable to return to work as the result of PTSD caused by the shooting incident, although one later changed their mind. The Court found no evidence Applicant recovered from the effects of the shooting incident. Rather, the medical records indicated Applicant suffered from PTSD symptoms from the time of the incident until long after his resignation.

The Court further found the board relied on the opinion of one doctor whose conclusions were not supported by evidence. Additionally, the Court found the board's decision to discount the medical opinions of two other IME physicians baseless and unsupported by evidence.

Further, the Court rejected the board's finding that Applicant's psychologist conclusions were "unreliable". The Court noted the opinion of a physician who had the benefit of assessing the plaintiff's condition through an extended course of treatment is entitled to greater weight than appointed evaluators. Applicant's psychologist did in fact evaluate his drug use and concluded it was caused by his PTSD.

Last, the Court concluded the board's determination Applicant's 2016 hospitalization was not a result of PTSD was unsupported by the evidence. In concluding it was the result of marital problems, the board ignored PTSD has far ranging effects that could have been the cause of Applicant's marital problems. During this hospitalization, Applicant was again diagnosed with PTSD and major depressive disorder. As such, the board's determination the shooting incident had nothing to do with his later hospitalization was unsupported.

In conclusion, the board's conclusion Applicant was not suffering from PTSD was against the manifest weight of the evidence.

Pension Board Unable to Rely on Two of Three IME Reports

Hampton v. Bd. of Trustees of the Bolingbrook Police Pension Fund, et al., 2021 IL App (3d) 190416

Police officer Alan Hampton was injured while positioning his squad car to block an intersection at an accident scene when another vehicle struck his car. He suffered an injury to his left shoulder and was transported to the hospital via ambulance. A subsequent MRI of his left shoulder showed osteoarthritis, degenerative joint disease and superior labral tear.
Following several weeks of physical therapy, Hampton was sent for a functional capacity evaluation ("FCE"). Because the FCE evaluator did not have a copy of the correct job description, he used the job description for police officer found in the Dictionary of Occupational Titles (DOT) and found Hampton could perform at the "heavy" demand level such that he could return to work. Upon receipt of the FCE report, Hampton's doctor was more cautious and instructed a return to work with restrictions as set forth in the FCE. The Village's workers' compensation doctor also directed a return to work but with restrictions.

Based on the medical records and a physical examination, two of three pension board doctors found Hampton "not disabled". Subsequent to the pension board's IMEs, Hampton underwent a second FCE which concluded he had functional limitations when it came to specific aspects of the job description for police officer in Bolingbrook. Based on the record, the board found Hampton not disabled.

On appeal, the Appellate Court found the pension board's conclusion Hampton was not disabled to be against the manifest weight of the evidence. Specifically, the Court found the board erred in placing greater weight on the two IME reports that found Hampton not disabled. In the case of the

IME performed by Dr. Williams, the Court observed he found Hampton not disabled based on the first FCE which only returned him to restricted duty and ignored the conclusion of Hampton's treating physicians the FCE restrictions included the inability to use physical force and subdue resisting individuals. Likewise, the Court found fault with the opinion of Dr. Biafora who merely found a temporary exacerbation of a pre-existing condition as inconsistent with the facts in the record.

Finally, the Appellate Court found the board erred in placing greater weight on the first FCE while discounting the second FCE finding Hampton could not return to work. The Court found the second FCE to be more reliable inasmuch as it was conducted with the benefit of the job description for a Bolingbrook police officer. The Court concluded, "Considering all the evidence in the record, and the fact that the Board erred in relying on certain evidence in support of its decision that Hampton was not disabled, we conclude that the Board's decision was against the manifest weight of the evidence." While the board had not reached the issue of whether Hampton's disability was the result of an "act of duty", based on the evidence in the record, the Appellate Court awarded Hampton a line of duty disability.

While it is not unheard of for a reviewing court to find a pension board should not have relied on one of its doctor's reports, in this case the Appellate Court found two of the three pension board doctor's reports against the manifest weight of the evidence. This illustrates the detailed analysis court's perform in examining the evidence relied upon by pension boards in making disability determinations.

Line of Duty Disability Denied for Officer Returning from Testifying at Grand Jury

Griffin v. Vill. of New Lenox Police Pension Fund, 2021 IL App (3d) 190557

Plaintiff Paul Griffin ("Applicant") applied for a line-of-duty disability pension and an alternative not-on-duty pension after injuring his knee tripping on a curb while walking back to his police vehicle after providing subpoenaed grand jury testimony. Applicant testified at the time of his injury he was not looking for crimes, was not contacted by anyone to respond to any emergency or call for service and completed his duties before the grand jury. He was simply walking back to the car to return to the police station to complete more paperwork.

The unanimous opinion of all three (3) independent medical examiners was Applicant was disabled. While the Pension Board found Applicant was disabled, they denied his line-of-duty claim and awarded him a not-on-duty pension.

Applicant appealed to the circuit court, the circuit court reversed the decision and the Pension Board appealed to the appellate court. On appeal, the Appellate Court analyzed numerous cases where it

was determined officers were injured in the performance of acts of duty and where they were not injured in the performance of an act of duty.

The Court found Applicant's injury was most similar to *Filskov v. Board of Trustees of the Northlake Pension Fund*, 409 Ill. App. 3d 66 (2011), wherein an officer's foot was inadvertently run over by his partner as he walked from the police station to the squad car to resume patrol duties. The *Filskov* Court found the officer was not responding to a call, had yet to resume patrol duties and was acting in the capacity in which civilians commonly act, acting as an automobile passenger, which did not involve special risk.

Here, the Court found ordinary citizens are called up every day to testify in court and face the same risk of slipping on a curb returning to their vehicle with papers in hand. Applicant was not looking for crimes, he was not contacted to respond to any call, and he completed his court duties. Despite Applicant's contention he was under order to appear, the Court found no evidence he was exposed to special risk. Further, the Court found Applicant's argument that carrying a police report and subpoena is unique to police work unconvincing as they were subject to FOIA and the content did not change his risk.

The Court concluded an officer must be doing something more than merely being on duty and the act of wearing a service weapon, handcuffs and a police radio does not involve special risks not ordinarily assumed by a citizen in the ordinary walks of life. As such the Court reversed the circuit court's judgment.

Mistake in Benefit Statute Not Retroactive

Cronholm v. Bd. of Trustees of the Lockport Township FPD Firefighters' Pension Fund, 2021 IL App (3d) 190636-U

As you may recall, in 2014 the "Mistake in Benefit" sections were added to both Articles 3 and 4 of the Pension Code. At least according to the text of the statutory amendments, these new provisions allowed a fund to correct a benefit mistake upon discovery of the "mistake". However, the same amendments narrow defined "mistake" to exclude many of the issues pension funds see on a regular basis when it comes to overpayments.

Factually in this case, the member was a member of the Lockport Firefighters' Pension Fund when he left for the Oak Brook Firefighters' Pension Fund. He subsequently returned to Lockport. Upon his return to Lockport, Cronholm elected reciprocity allowing him to proportionally collect benefits from both Oak Brook and Lockport upon retirement.

Unbeknownst to Lockport at the time of approval of Cronholm's reciprocity request, the demographic information provided by Oak Brook and used to compute the request was incorrect. In 2009, Cronholm retired and began receiving benefits from both pension funds based on the incorrect

information. Six months after retirement, Oak Brook discovered it's error and corrected Cronholm's benefit resulting in an increase from that Fund. This should have resulted in a proportionate decrease in the amount being received from Lockport but Oak Brook did not inform Lockport of the discovery of this error.

Fast forward to 2016 when Lockport's newly retained accountants discovered the error had resulted in ongoing overpayments to Cronholm totaling over $20,000 to date. The Board commenced a hearing whereby it prospectively decreased the monthly benefit amount to Cronholm to the corrected amount pursuant to the mistake in benefit statute.

Cronholm sued. On appeal, the Board's action was reversed and the Appellate Court ordered the full benefit, even though too high, paid to Cronholm. In reaching this result, the Appellate Court first found the mistake in benefit amendment to the Pension Code in 2014 cannot be applied retroactively because the legislature did not explicitly include retroactive language. Because Cronholm was first awarded retirement benefits in 2009, the statute could not apply even to correct future payments. The Court concluded the 35 day period of Administrative Review Law applied instead.

Addressing the 35 day limitation of Administrative Review Law, the Court found it began to run on 2009 when he began to receive benefits. As such, the award could not be modified. Moreover, the Court found even if the amended version of the statute could apply retroactively, it did not meet the definition of "mistake" inasmuch as no "error" occurred because Lockport had intentionally used the figures provided to calculate Cronholm's retirement benefit without verifying their accuracy with Oak Brook.

Finally, the Appellate Court also found Cronholm's entitlement to the overpaid pension protected by the Pension Protection Clause of the Illinois Constitution. Unlike several prior Court that have found a member never has a constitutional right to an incorrect pension benefit, here the Appellate Court reasoned the new "Mistake in Benefit" statute cannot be applied to Cronholm because it would change the terms of his contract with the pension fund years after he had first entered service.

Lockport also raised issues suggesting allowing Cronholm to continue to collect an overpaid benefit may have adverse consequences on the tax-exempt status of the Fund. To this concern, the Appellate Court replied, "the responsibility to remain qualified lies with the Lockport Fund itself to act with greater care when finalizing pensioners' benefits. Indeed, to allow the Lockport Board to reopen Cronholm's final pension decision because 'it failed to certify the accuracy of the information on which it based its decision' would both allow the Administrative Review Law to be circumvented and cause pensioners uncertainty as to their entitled benefits."

While this may seem a harsh result for the pension fund, it certainly drives home how difficult it is to modify benefits once they have been paid. The moral is to "measure twice and cut once" when it

comes to granting of any benefit. Failure to do so may result in the inability to set things right if a mistake, even one not caused by the Fund, is discovered at a later date.

Pension Board's Termination of Disability Pension Against Manifest Weight of Evidence

Pagorek v. Bd. of Trustees of the City of Harvey's Firefighters Pension Fd., 2020 IL App (1st) 200526-U

In an unpublished, non-precedential opinion the First District Appellate Court overturned the decision of the pension board which terminated Firefighter Pagorek's disability benefits. The pension board found he had recovered from his disability.

In 2007, the pension board granted Pagorek's nonduty disability, finding him unable to perform full and unrestricted firefighter duties as the result of severe pain from spondylosis following a fall. During the disability process, Pagorek underwent a functional capacity evaluation ("FCE") which revealed he could not lift loads greater than 120 pounds. While Pagorek performed at the very heavy-duty level, it was determined that if he returned to duty, he risked reinjuring himself or others. Further, the unanimous opinion of the three independent medical examiners retained by the board found him disabled.

Pagorek was under 50 years old when he was granted the disability. Pursuant to section 4-112 of the Pension Code, he was required to undergo annual medical examinations to verify continuance of disability.

In 2015, Pagorek underwent an annual examination with Dr. Gleason who concluded Pagorek's spine condition was unchanged since his 2005 MRI and found him disabled from full and unrestricted duty. In his affidavit of eligibility, Dr. Gleason noted Pagorek received no treatment since 2007.

In 2017, Pagorek underwent an annual examination with Dr. Wehner who concluded Pagorek was no longer disabled from full and unrestricted duty. Wehner noted Pagorek's spondylolisthesis was not, by itself, a disabling condition and his pain complaints were subjective in nature. She found he only experienced mild pain and had a very active lifestyle working 40 hours per week climbing ladders as a satellite dish technician.

At a hearing to determine whether Pagorek recovered, Dr. Wehner testified despite Pagorek's complaints of pain, she did not notice any facial grimacing, posturing or splinting. She further testified his gait and motor strength was normal. She found no symptom magnification. Dr. Pagorek disagreed with Dr. Gleason's 2015 examination because the clinical findings did not show any abnormality, so Dr. Gleason based his opinion on Pagorek's subjective complaints. Further, Dr. Wehner testified lifting something heavy would not cause spondylolisthesis to progress.

Pagorek refuted Wehner's testimony with recent reports from his treating physicians who found his condition chronic and unchanged, necessitating interventional pain management, epidural injections and physical therapy. Dr. Wehner disagreed with the treating physicians, accusing them of relying on Pagorek's subjective complaints alone.

At the hearing, Pagorek offered unrefuted testimony of his constant pain and limitations on his daily life. He further testified, while he did not get physical therapy or other treatment from 2006 to 2017, he was on Flexeril, Naproxen and Tramadol for pain. Pagorek was unable to get further treatment because he did not have health insurance. He avoided surgery because he was told to wait until he could not walk.

Pagorek also offered unrefuted testimony his recent jobs were far less physically demanding than firefighter duties. When he finally got a job with health insurance in 2017, he sought treatment.

By a 3-1 vote, the pension board terminated Pagorek's benefits stating it accorded "substantial weight" to Wehner's opinion and less to the opinions of Pagorek's treating physicians since he only sought treatment after pension proceedings began. The majority also found it significant Pagorek did not seek treatment for over a decade.

Pagorek sought administrative review in the circuit court, which affirmed the pension board's decision. Pagorek appealed and the Appellate Court reversed.

On appeal, the Appellate Court applied the manifest weight standard meaning the court defers to the board's factual findings unless the opposite conclusion is clearly evident. Under the Pension Code, a firefighter's pension may not be terminated without "satisfactory proof" the pensioner has recovered from his disability.

In this case, Drs. Gleason, Bayer and Kondamuri all opined Pagorek's back condition remained unchanged since 2005 and he remained disabled. The Court found the pension board's reliance on Dr. Wehner's opinion to the exclusion of all other evidence, to be against the manifest weight of the evidence. Dr. Wehner's opinion was not supported by the facts.

First, Dr. Wehner opined Pagorek was physically capable of performing firefighter work because he did not have any daily limitations. However, Pagorek gave detailed, uncontradicted testimony regarding daily limitations including not being able to pick up his children and difficulty performing basic household tasks.

Second, Dr. Wehner's opinion was based on Pagorek's job as a satellite technician. While the job entailed occasionally climbing ladders carrying up to 30 pounds, it was far less physically demanding than firefighting. None of Pagorek's activities were inconsistent with his disability claim and his medical opinions corroborated his claim.

Third, Dr. Wehner opined Pagorek's subjective complaints were unfounded as he had not used pain medications for over 10 years. In contrast, the record showed Pagorek was taking multiple medications to alleviate back pain.

Fourth, Dr. Wehner opined Pagorek "did function as a firefighter with [L5-S1 spondylolisthesis] in the period of his initial hiring in 1997 to his report of the accident in 2005." However, the Court found there was no evidence Pagorek had spondylolisthesis in 1997 and it was unclear when it developed. Further, Dr. Wehner acknowledged there was no symptom magnification.

The Court noted, every doctor who examined Pagorek, including Dr. Wehner, determined he was experiencing pain. Further, MRI scans plainly established he had a spinal fracture and slipped vertebrae that caused his initial disability in 2007 and his condition remains unchanged. It is undisputed Pagorek has a spinal condition causing him pain, and three doctors opined his condition prevents him from resuming full and unrestricted firefighter duties.

The Court concluded Dr. Wehner's opinion was founded on multiple statements that are not supported by the recorded, and all the other doctors were unequivocal in their opinion Pagorek remained disabled. As such, the board's termination of Pagorek's disability benefits was against the manifest weight of the evidence.

Line of Duty for Psychological Disability Not Claimed by Applicant Upheld by Appellate Court.

City of Peoria v. Firefighters' Pension Fund of the City of Peoria, et al., 2020 IL App (3d) 190055-U

Captain Angela Allen, a Peoria firefighter, filed an application for line of duty disability benefits stemming from what she termed a "vestibular/ocular motor disorder". The City of Peoria filed a petition to intervene which was allowed by the Pension Board.

Allen was fighting a house fire when she slipped and fell backward down a flight of stairs. She finished her shift and did not seek medical care for two days after the accident. In the year following the accident, she sought medical treatment from numerous providers for a number of problems including head, neck, back, shoulder, and arm pain, vertigo, dizziness, nausea, headaches, vision problems, and sensitivity to light and noise.

The pension board held multiple days of hearings, hearing from numerous witnesses and admitted voluminous documentary and medical evidence. After considering multiple medical opinions from both treating physicians and independent experts, it became apparent the evidence was conflicted on several issues. Ultimately, the Pension Board granted Allen's application for a line of duty disability based on a psychological condition finding her disability was either caused or, at the very least, contributed to by her fall down the stairs at the fire scene.

The City appealed. The arguments raised by the City on appeal and administrative review revolved around two central themes: First, the City argued Allen did not seek a disability for a psychological condition in her application. In addition, the City argued Allen was not disabled due to a

psychological condition inasmuch as evidence in the record suggested she could return to duty if properly treated.

Both the circuit court and appellate court affirmed the decision of the pension board granting a line of duty disability. Agreeing with the pension board determination, the appellate court found that file the evidence in the records was conflicted, there was "ample evidence presented from which the Pension Board could fund that Allen was disabled." While some doctors in the record found Allen did not suffer from ant neurological or cognitive disorder, the very nature of her psychological disability, somatic symptom disorder, meant she could have numerous disability subjective symptoms with no underlying objective cause. The court also found the pension board determination Allen's disability was caused, at least in part, by her fall down the stairs, was support by several doctor's opinions.

Turing to the City's argument Allen should not be considered disabled because she failed to seek treatment, the court again found evidence to support the pension board's conclusion no reasonable treatment alternative existed inasmuch as the evidence suggesting Allen should seek addition treatment did not suggest the treatment would be successful in returning her to full duty or how ling such treatment would take. In short, on the evidentiary issues raised by the City, the appellate court ultimately concluded, "Because the Pension Board's findings were supported by the evidence presented, we confirm the Pension Board's ruling, granting Allen's application for a line-of-duty disability pension."

Finally, the court rejected the City's argument Allen could not be found disabled due to a psychological condition she did not claim in her application. On this issue, the court found that many of the symptoms listed in the application were the same symptoms she would be suffering as a result of her psychological disorder. As a result, her disability was sufficiently alleged in her application and the City did not argue it was surprised or unable to prepare for the hearing based on the specificity of her claimed disability.

Appellate Court Signals Departure of Sole Causation Theory for Mental Disability Claims of Police Officers

Nelson v. Retirement Bd. of the Policemen's Annuity and Benefit Fund of Chicago, 2020 IL App (1st) 192032-U

The First District Appellate Court reversed the decision of the Pension Board ("Board") and Circuit Court granting an ordinary disability benefit where officer-plaintiff developed PTSD following her response to an armed robbery call. The Appellate Court ordered plaintiff be awarded a line-of-duty disability benefit.

By way of background, plaintiff applied for a line-of-duty disability benefit after she was no longer able to work following an incident where she responded to an armed robbery. On December 8, 2016, plaintiff was assigned to a patrol car and responded to a "possible kidnapping of a FedEx driver." Eventually, the call was amended to an "armed robbery" of a FedEx driver. Plaintiff was nearby and responded to the call. After locating the FedEx truck, Plaintiff called dispatch three to four times;

however, her dispatcher never responded. Plaintiff testified, "I just didn't know what was going on" and said she "felt abandoned during a heightened sense of danger."

Plaintiff returned to work the following day, and, as she passed the area of the robbery on patrol, she "experienced nausea" and "tightness in [her] chest." Subsequently, she was taken to the hospital and never returned to full duty.

Plaintiff underwent a course of therapy following the incident and was prescribed Lexapro (an antidepressant) daily. Plaintiff applied for a duty disability based upon her inability to return to full, unrestricted duty.

Following her application, plaintiff was evaluated by a plethora of physicians. The record demonstrates plaintiff had long standing psychological issues. After a hearing before the Board, she was awarded an ordinary disability, not a duty disability. In its written decision the Board noted, "[A]t no point in time ever came upon the alleged offender. Rather, the only individual [she] had [an] interaction with during the incident was the FedEx employee. As such, [plaintiff] was not, as she claims, in any real or reasonably perceived danger during the incident, and therefore was not involved in any act of police duty inherently involving special risk."

Because of [plaintiff's] repeated issues with coworkers, the Board finally concluded that her "disabling condition is not the result of an identifiable act of duty incident" but rather: "is a result of her perceived unconfirmed mishandling by the [Department] of the events surrounding the December 8, 2016, incident, which was further exasperated by her longstanding and documented history of issues with emotional and psychological distress associated with her perception and conjecture of how she was being treated and viewed by others within the [Department]."

With respect to her award of an ordinary disability benefit, rather than a duty disability benefit, the Board specifically stated: "[plaintiff's] medical condition is disabling which entitles her to a disability benefit. The Board further finds that [plaintiff], by her self-serving testimony, has not met her burden of proving her disability is the result of an identifiable act of duty incident, but rather is the result of a long-standing and continuing issue concerning her perception of the [Department]'s failure to respond in a manner she feels is appropriate and how others within the [Department] view her. [Plaintiff's] application for a duty disability benefit is therefore denied, and [plaintiff] is granted an ordinary disability benefit[.]"

Plaintiff filed a complaint for administrative review of the Board's decision in the circuit court and, on July 15, 2019, the circuit court affirmed the Board's decision. Plaintiff filed a motion to reconsider the court's ruling, arguing, for the first time, the administrative record was incomplete because it did not include an arbitration award from April 30, 2018. The arbitration was filed by the Fraternal Order of Police, on behalf of plaintiff.

The filing asserted plaintiff should be granted an "injury on duty" disability, which the Chicago Committee on Finance originally denied her. The arbitrator found plaintiff's "injury arose out of her employment as a police officer" and ordered the Department to certify [her] injury as an 'injury on duty'" for the purpose of granting her disability income. The circuit court denied the motion to reconsider on September 11, 2019.

On Appeal, plaintiff argued (1) the board was bound by the arbitration award, and (2) the board erred in only awarding an ordinary disability benefit.

The Court concluded the Board is not bound by the arbitration award. Without addressing the merits of this claim, the Court held the argument was never raised before the Board, accordingly, it will not be considered for the first time on administrative review. Further, the issue was raised for the first time in a motion for reconsideration. As such, plaintiff forfeited any collateral estoppel argument.

Turning to the merits of the disability claim, the Court held plaintiff's injury was in the performance of an act of duty. Moreover, the mere fact plaintiff may have been particularly susceptible to PTSD "does not change the fact that the cause of her condition was the events of December 8, 2016." An entitlement to a duty disability turns on "whether the officer's injury leading to a disability occurred during an "act of duty" as defined under section 5-113 of the Pension Code." Plaintiff's disability was linked to an identifiable incident that a civilian would not experience, namely, responding to a report of an armed robbery.

Pension boards should take note of a possible shift in how courts are evaluating mental disability claims for police officers. The First District seems to be signaling a departure from the recent *Prawdzik* decision. There, the Third District Appellate Court held a police officer's disability must "entirely" come from a specific, identifiable act of duty. Here, the Court appears to suggest the "act of duty" need not be the sole or exclusive cause, even in mental disability matters for police officers.

2016 Legislation Conflicting with the Pension Protection Clause Held Unconstitutional

Williamson Co. Bd. of Commissioners v. Board of Trustees of the IMRF, 2020 IL 125330

In *Williamson County Board of Commissioners v. Board of Trustees of the IMRF*, the Illinois Supreme Court held amendments in 2016 to the Illinois Pension Code (section 40 ILCS 5/7-137.2(a)), unconstitutional under the Illinois Constitution's pension protection clause article XIII, section 5, of the Illinois Constitution (Ill. Const. 1970, art. XIII, § 5).

The Pension Code initially allowed elected county board members to take part in the Illinois Municipal Retirement Fund (IMRF) if the participant occupied a position requiring 1000 hours of service annually, and the public employee filed an election to participate. The 1968 administrative rule necessitated the governing body of a participating employer to adopt a resolution certifying that the position of elected governing body members required the hourly standard. Williamson County and the board members complied with the 1968 rule. The board members satisfied the original requirements for IMRF participation, electing to participate in 2004, 2008, and 2012.

In 2016, Public Act 99-900, amended parts of the Pension Code (40 ILCS 5/7-137.2(a), requiring, for the first time, that all county boards certify within 90 days of each general election that their board members had to work sufficient hours to meet the hourly standard for participation and that members who take part in IMRF submit monthly timesheets. IMRF issued "Special Memorandum #334" to the authorized agent in every county, explaining the change: "If the County Board fails to adopt the required IMRF participation resolution within 90 days after an election, the entire Board will become ineligible and IMRF participation will **end** for those Board members." (emphasis added). The Fund also sent a direct mailing to individual county board members participating in

IMRF. Subsequently, one of the board members were re-elected, triggering the new requirement in §7-137.2(a) to adopt a resolution with the new provisions in the statute. However, the Williamson County Board did not timely adopt the required resolution.

Even though the County Board adopted the resolution seventeen (17) days late, IMRF notified the plaintiffs they were not eligible for continued IMRF participation. The board members appealed to IMRF, and at the hearing, they argued Public Act 99-900 was unconstitutional under the pension protection clause. IMRF issued a decision and order terminating the board members' benefits but failing to address the constitutional argument. In 2019, board members again made this argument at Administrative Review, and the circuit court issued a judgment in favor of the board members holding Public Act 99-900 unconstitutional, directing IMRF to reinstate the board members with "full rights, membership, and participation."

IMRF appealed directly to the Illinois Supreme Court according to Rule 302 (a), and the sole issue before the Court was whether §7-137.2(a) of the Pension Code violates the pension protection clause. The Court cited the well-developed case law regarding the pension protection clause holding, "the original requirements for the [board member's] IMRF participation cannot be changed unilaterally by the legislature." The Court emphasized the "*newly created* requirement in the Pension Code [§7-137.2(a)] did not exist when [the board members] began their employment and participation in IMRF. Thus, it cannot be constitutionally applied to [these board members]."

Since a public employee's membership in a pension system is an enforceable contractual relationship, the Court protected continued IMRF participation from unilateral legislative diminishment or impairment when the board members became IMRF participants and accrued the service credits. Ultimately, the Illinois Supreme Court affirmed the circuit court's judgment and found §7-137.2 of the Pension Code invalid under the pension protection clause.

Line-of-Duty Disability Awarded Despite Pre-Existing Mental Health Condition

Village of Franklin Park v. Sardo, 2020 IL App (1st) 191161 (2020)

The Appellate Court in this matter determined a police officer with a preexisting mental condition is not disqualified from a line-of-duty pension. The Court further held that a preexisting physical disability and a preexisting mental condition are treated alike and confirmed that an act of duty need not be the sole cause of disability.

The facts underlying the case were not in dispute. Prior to becoming a Roselle police officer in 1996, Detective Christopher Sardo served in the United States Marine Corps from 1987 to 1991, including a tour of duty in Desert Storm. During his tour of duty, Sardo was exposed to several traumatic incidents including the deaths of fellow Marines. Post-discharge, Sardo was diagnosed with PTSD by the Department of Veteran Affairs and received a 90% disability rating, 70% of which was related to PTSD. Sardo received outpatient treatment including counseling, anger management and medication. During his course of treatment, Sardo continued to work full time.

During his time as a police officer, Sardo experienced numerous traumatic events including deaths of firefighters and police officers, none of which rendered him unable to perform his job. Sardo was

an exemplary employee with excellent performance reviews including his last review on December 31, 2013.

On February 6, 2014, Sardo responded to a fatal Metra train versus pedestrian accident. Sardo, arrived to disintegrated body parts all over the area. As lead investigator, Sardo collected evidence, interviewed witnesses, reviewed video and notified next of kin. When Sardo showed the victim's husband a photo of a tattooed body part for identification, the husband began screaming and running. Sardo was unable to forget the screaming. Soon after the accident, Sardo began outpatient therapy for depression, PTSD and thoughts of suicide. Sardo stopped working on May 9, 2014 and applied for a line of duty pension on June 22, 2015, asserting a disability due to repetitive work exposure to life threatening and gruesome situations culminating in the Metra accident.

Sardo was examined by three independent medical examiners. In summary, the physicians determined (i) Sardo had PTSD and Major Depressive from his military service but was able to serve as a police officer, (ii) the train accident led to his trauma and triggered his preexisting PTSD, and (iii) he was permanently disabled as a result of the accident.

The pension board concluded the train accident was not the predominate cause but awarded Sardo a line-of-duty disability as the accident contributed to his disability. The Village filed a complaint for administrative seeking administrative review. The Village argued (i) an act of duty must be the sole cause of an officer's disability and (ii) Sardo's police work cumulatively aggravated his PTSD. The Village further argued caselaw supports treating mental and physical disabilities differently and, unlike a physical disability, an officer may not receive a line-of-duty pension for a mental disability when the mental condition preexisted. The circuit court affirmed the pension board's decision and held an act of duty need not be the sole cause of the police officer's mental disability and the board may award a line of duty pension to an officer for a mental disability despite an officer's preexisting mental condition.

The Appellate Court affirmed the circuit court's decision. The Appellate Court reasoned that the words "solely" and "entirely" do not appear under section 3-144.1(a) of the Pension Code. To support their position, the Village cited a firefighter disability case. The Appellate Court noted they do not rely on cases involving a firefighter as authority for determining a line-of-duty disability pension for a police officer and under the Code's plain language, an officer may receive a line-of-duty pension even if the disability is not "solely" caused by an act of duty. Countering the Village's position that the board should treat preexisting mental conditions differently than preexisting physical conditions, the Appellate Court held that the provisions of 3-114.1(a) neither requires nor suggests that the board apply a different standard. To be clear, the Appellate Court confirmed that in order to receive a line-of-duty pension based on a mental disability, the officer needs to establish the disability is a result of a specific, identifiable act of duty unique to police but clarified that a physical disability and mental disability are to be treated alike.

Mistaken Approval of Service Credit Not Final Administrative Decision

Chappell v. The Board of Trustees of IMRF, 2020 IL App (1st) 1922255

The First District Appellate Court determined that an IMRF grant of service credits based upon an IMRF designated agent's erroneous pension eligibility certification was a not a "final administrative decision" pursuant to Section 3-101 of the Administrative Review Law subject to the 35 day rule.

Chappell was the executive director of a not-for-profit community center contracted by River Forest Township ("Township") to provide youth and recreational services from 1986-2002. Chappell, as the executive director, was aware that community center employees were ineligible for IMRF participation as Chappell previously declined participation for community center employees as it was too cost prohibitive. Chappell was paid directly by the community center, not the Township.

In 2002, Chappell was employed by Township as a facilities manager and received salaries from the Township and the community center. Upon his employment with the Township, Chappell completed an enrollment form from IMRF and an "omitted service application" seeking to purchase credit from his years at the community center. Chappell used the Township IMRF employer ID number when listing the community center. The Township's supervisor and designated IMRF agent signed the "omitted service credit application" incorrectly certifying Chappell was a Township employee from 1986 to 2002. Chappell received confirmation from IMRF's "Past Service Unit" indicating he was eligible to purchase 198 months of service credit. Chappell purchased the service credit and retired in 2015.

In 2017, an internal staff audit revealed that the Township certified Chappell's pension eligibility in error as he was not a Township employee between 1986 and 2002. IMRF notified Chappell that his pension would be recalculated. At an administrative hearing, the hearing officer recommended to the board of trustees of IMRF that Chappell's benefits be recalculated. IMRF accepted the recommendation and the circuit court on administrative review reversed finding IMRF lacked jurisdiction to reconsider the approval of the omitted service application, IMRF didn't have statutory authority to recover the benefits paid in error and last IMRF was equitably estopped from recalculating the benefits. IMRF and the Township appealed.

Focusing on whether IMRF's approval of Chappell's omitted service credit application was a final administrative decision subject to the 35-day rule, the Appellate Court concluded instead, IMRF made an "interlocutory administrative determination" not subject to the 35-day limitation. IMRF's initial approval was a "rubber stamp approval" highlighted by the fact IMRF did not hold a hearing or listen to testimony. The automated approval process was a statutory process created by the legislature to facilitate the efficient administration of a sizable public pension fund and its reliance on pension eligibility certificates of its participating employers is statutory and practical commonplace. As the approval was not subject to the 35-day limitation, IMRF had jurisdiction to reconsider the initial approval long after the 35 days expired.

Further, the Appellate Court found the Township and IMRF did not have the statutory authority to grant Chappell the omitted service credits because he did not meet the statutory definition of employee. The terms of the Pension Code control who is a qualified employee and no act by a municipality can make an ineligible employee eligible. A decision by an agency that lacks statutory power to enter the decision lacks personal and subject matter and as such, all decisions are void. As such, IMRF's approval was void for want of Pension Code authorization.

Regarding IMRF's authority to recover benefits paid in error, the Court interpreted "error" as defined by Black's Law Dictionary to mean "an assertion or belief that does not conform to objective reality." Specifically, the Court noted that had the legislature intended to limit IMRF's authority to recalculate a pension and recoup the overpayment of benefits to cases involving arithmetical errors, it could have done so. The Court held that neither the Township's certification, nor IMRF's approval

conformed to objective reality and since Chappell was ineligible for pension benefits as the employee of a non-participating employer from 1986 to 2002, IMRF was duty bound to retain overpayment amounts.

Last, regarding equitable estoppel, the Court denied Chappell's claim and he knew full well that he did not qualify for IMRF participation from 1986 to 2002 and as such his reliance on the actions taken by the Township and IMRF was not reasonable.

Accordingly, the decision of the circuit court was reversed, the decision of IMRF affirmed and the case was remanded for further proceedings not inconsistent with Court's decision.

3. PSEBA Cases

Home Rule Municipality May Not Change Substantive Terms of PSEBA by Ordinance

Int'l Ass'n of Fire Fighters, Loc. 50 v. City of Peoria, 2021 IL App (3d) 190758

In 2018, the City of Peoria passed an ordinance specifically defining undefined terms from the Public Safety Employee Benefit Act ("Act") 820 ILCS 320/1 *et seq.* including "injury", "gainful employment" and "catastrophic injury". The ordinance also amended the application procedures for those seeking benefits under the Act.

After the City passed the ordinance, the Union filed a complaint seeking a declaratory judgment that the definitions were not consistent with the Act. The City responded its definitions were not inconsistent with the Act and as such it had the power to define the terms under its home rule authority. The circuit court granted summary judgment in favor of the Union finding the Act's definitions were not ambiguous considering the language along with previous court opinions. The circuit court ruled the City's definitions were invalid and superfluous. The City appealed.

In *Krohe v. City of Bloomington*, 204 Ill. 2d 392 (2003), the Illinois Supreme Court found the phrase "catastrophic injury" as used in the Act was ambiguous and concluded the legislative intent was to make the phrase synonymous with an injury resulting in a line-of-duty disability under Section 4-110 of the Illinois Pension Code. Here, the City attempted to distinguish *Krohe* on the basis the City was a home rule municipality.

The Court concluded, while the City has authority as a home rule unit to adopt procedures for administering the Act, it may not provide benefits in a manner inconsistent with the requirements of the Act. The City can define the administrative proceedings for benefit determination but cannot define the Act's substantive terms.

Once the Illinois Supreme Court construes a statute, the construction becomes a part of the statute and the General Assembly can change it if desired. After *Krohe*, the General Assembly made no

such change. Thus, if a firefighter is injured and awarded a line-of-duty disability, he has a catastrophic injury.
In conclusion, the ordinance defining the Act's terms was not a valid exercise of home rule authority.

No PSEBA Benefits Without An "Emergency"

Heneghan v. City of Evanston, 2020 IL App (1st) 192163-U

Firefighters who are (1) catastrophically injury (2) in response to what is reasonably perceived to be an emergency are entitled to health insurance benefits pursuant to the Public Safety Employee Benefits Act (PSEBA) 820 ILCS 320 *et seq*. While case law holds a police officer or firefighter awarded a line of duty disability by their pension fund is "catastrophically injury" by definition (*Krohe v. City of Bloomington*), the applicant for PSEBA benefits must still demonstrate their catastrophic injury occurred "as the result of what is reasonable believed to be an emergency." That second prong was the issue before the court for an injured firefighter in this case.

The firefighter in this case was injured during a live fire training exercise. The training exercise was carried out using a structure made of shipping containers in an effort to re-create conditions a firefighter would face in an emergency. Plaintiff was assigned to ventilate the roof for firefighters within the burring structure. The roof included two pre-cut holes covered with plywood. Plaintiff's partner was instructed to open the first hole using a saw. When the saw failed, Plaintiff opened the first ventilation hole using his axe. After removing the first vent hole cover, Plaintiff moved to the rear of the roof to remove the second cover. Plaintiff proceeded to pry open the second cover to find little resistance. His act of prying open the second cover expecting resistance but finding none caused him to lose his balance and fall 12 feet to the ground. He suffered bilateral heel fractures, underwent multiple surgeries, and was awarded a line of duty disability by the firefighters' pension fund.

After award of his line of duty disability, Plaintiff made application to the City for PSEBA benefits. The City denied his request on the basis his injury was not incurred in response to what was reasonably believed to be an emergency. The circuit court affirmed the City's decision to deny health insurance benefits.

On appeal, the Appellate Court recognized Plaintiff is "catastrophically injury" under PSEBA because he received a line of duty disability. The sole issue was whether his injury was incurred "as the result of what is reasonably believed to be an emergency". In the PSEBA context, the Illinois Supreme Court has defined "emergency" as, "an unforeseen circumstance involving imminent danger to a person or property requiring an urgent response." (*Gaffney v. Bd. of Trustees of Orland Fire Prot. Dist.*). In applying this definition to a prior PSEBA case, the Supreme Court in *Gaffney* found a firefighter injured during a training exercise when his hose became entangled inside a burning structure rose to the level of an "emergency". Conversely, the same Court found another firefighter injured rescuing another firefighter during a training exercise using "black out" masks and no live fire was not an "emergency" for PSEBA purposes because it was conducted under controlled circumstances, no one was in imminent danger, and no unexpected development occurred.

Applying the *Gaffney* case to this matter, the Appellate Court agreed Plaintiff was not injured in response to an emergency. It reasoned the unforeseen circumstance occurring in this case was the

failure of the saw. Once the first vent cover was opened using an axe, the unforeseen circumstance ended. The Court agreed the failure of the saw qualified as an "emergency" under PSEBA, but found that after opening the first vent cover, Plaintiff knew he could open the second cover using the axe. The Court held, "the emergency ended once Plaintiff found a suitable replacement for the saw. The loose vent cover, although unforeseen, did not create a new emergency. Therefore, plaintiff's fall was due to his miscalculation of force, not from a consequence of the saw's failure." In short, the Court found Plaintiff was not injured as the result of an emergency.

While PSEBA is not a benefit administered by pension funds, as you can see it does have some interplay with award of duty disability benefits. Each case is a fact specific inquiry. Actions that qualify as an emergency in one context may not meet that threshold in another. Here, the Appellate Court affirmed the denial of PSEBA benefits for the firefighter.

4. FOIA/OMA Cases and PAC Opinions

Entering Closed Session for "Probable or Imminent" Litigation

Public Access Opinion 21-003

The Open Meetings Act allows public bodies to enter closed session to discuss "litigation, when an action against, affecting, or on behalf of the particular body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the findings shall be recorded and entered into the minutes of the closed meeting." 5 ILCS 120/2(c)(11).

In this case before the Pubic Access Counselor at the Illinois Attorney General's Office, a citizen complained when the City of Hillsboro City Council entered closed session to discuss a storm sewer main located without easement underneath a property on which the citizen wanted to build a garage. After several email exchanges with the Mayor and making public comment at the meeting, the citizen was displeased with the progress being made on resolution of the issue. Importantly, no threat of litigation had been made by either party.

Following the citizen's public comment, the City Council entered closed session to discuss "possible litigation". No other details were provided nor did the Council make a finding as to whether the litigation was "probably or imminent" or the basis for such a finding. The citizen filed a complaint asserting the City Council improperly entered executive session with the Public Access Counselor at the Attorney General's Office.

Reviewing the matter, the PAC first noted the strict language of the statute requiring an action be "probably or imminent" and requiring the public body articulate the basis for such a finding in the closed session. Looking to several cases and prior Attorney General Opinions, the PAC noted that, "for litigation to be probably or imminent, warranting the closing of a meeting, there must be

reasonable grounds to believe that a lawsuit is more likely than not to be instituted or that such an occurrence is close at hand." The possibility a public body may become a party to a lawsuit is not sufficient. Moreover, assuming the litigation exception is properly invoked to enter closed session, the only matters that may be discussed are the "strategies, posture, theories, and consequences of the litigation itself."

After analyzing the recording of the City Council meeting, the PAC found the Council violated the Open Meetings Act by improperly entering closed session. Specifically, the PAC found the Council incorrectly cited the standard as "possible or threatened litigation" (as opposed to "probable or imminent"), did not make a finding in closed session as to why the storm sewer issue litigation could be probable or imminent, and, because no reasonable threat of litigation had been made, such a finding could not be made. The City Council was ordered to make the closed session verbatim recoding and meeting minutes publicly available.

This case serves as a good reminder of the stringent requirements for a public body to enter closed session for "probable or imminent" litigation. The public body must have reason to believe litigation is more likely than not to be filed involving the public body, the reason for so finding must be stated in the closed portion of the meeting, and only the "strategies, posture, theories, and consequence of the litigation itself" may be discussed behind closed doors.

FOIA Requestor Denied Attorney Fees and Penalties

Watson v. Foxx, 2021 IL App (1st) 200424-U

This case involved a request for fees and penalties under FOIA. Watson was a criminal defendant who was serving a 40-year sentence. He sought records from the Cook County State's Attorney's Office concerning five of his criminal convictions. After Watson filed this case, the Cook County SAO tendered about 3,000 pages worth of responsive documents Watson had been seeking, with appropriate redactions.

The trial court ruled, and the Appellate Court affirmed, this matter was moot because the SAO had now provided the responsive records. Watson also claimed he was due over $15,000 in costs, fees, and civil penalties under the FOIA. The Court found civil penalties under §11(j) of the FOIA were not proper because there were no facts presented to show the SAO had acted willfully or had intentionally failed to comply with FOIA. The court further noted, since the inmate represented himself in the FOIA lawsuit, he was not entitled to attorneys under §11(i) of the Act. This was because as a pro se litigant, he did not incur any attorney fees.

Although this was a favorable ruling for governmental bodies, please keep in mind, §3 of the Act requires a 5-day response time in most cases. Please let us know ASAP if you have a FOIA issue arise.

No Waiver of FOIA Exemptions from Disclosure to Third Party Vendor

Mancini Law Group, P.C. v. Schaumburg Police Dept., 2020 IL App (1st) 191131-U

The Plaintiff in this case, a personal injury law firm, sent a FOIA request to the Schaumburg Police Department seeking traffic accident reports for a certain period of time. While Plaintiff's request acknowledged certain information included in the accident reports would be exempt from disclosure under the FOIA, the reports produced in response also redacted home addresses, phone numbers, and insurance policy numbers under Section (7)(1)(b) of the FOIA for information constituting an unwanted invasion of personal privacy.

Rather than taking issue with whether this information is exempt under the FOIA, Plaintiff instead argued the police department waives its ability to redact this information because it voluntarily disclosed it to a third party vendor – Lexis Nexis. Through the course of discovery, it was revealed the police department provided unredacted accident reports to Lexis Nexis via contract to satisfy its requirement under the Vehicle Code to provide these reports to the Secretary of State. Lexis Nexis also acts as contractor for the State to allow municipalities to fulfil this reporting requirement. Once the reports are provided to Lexis Nexis, they may be obtained if a fee is paid. However, based on testimony from the Village, only those individuals involved in the traffic accident may obtained unredacted reports for this fee. Any party requesting the report not involved in the accident would receive a redacted version.

Plaintiff argued this was not the case inasmuch as one of its lawyers obtained an unredacted report from Lexis Nexis after paying the required fee. However, the Appellate Court found this issue raised by affidavit had been waived by Plaintiff and did support the conclusion put forth.

In support of its waiver argument Plaintiff relied on the 1997 Illinois Supreme Court case of *Lieber v. Bd. of Trustees of Southern Ill. Univ.* In that case, the Illinois Supreme Court found the university had waived it's argument certain information was exempt from the FOIA because it had previously voluntarily disclosed the same information to other parties. The Appellate Court in this case found that circumstance distinguishable inasmuch as the disclosure made to Lexis Nexis by the Schaumburg Police Department was mandated reporting to the State (through its vendor) required by the Illinois Vehicle Code. In a split decision, the Appellate Court found no waiver had occurred and the redacted made by the police department were appropriate.

The take away here might be voluntary disclosure may still result in waiver of a FOIA exemption but mandated disclosure, even if made to a third party vendor, protects potential exemptions.

Open Meetings Act and Virtual Meetings

PAC Opinion 2020-007

On November 24, 2020, the Public Access Counselor issued a binding opinion concerning the conduct of virtual meetings under the Open Meetings Act. The final rule is no portion of the virtual meeting may be muted, not even for a brief "side bar". Until the proper procedures for adjourning to executive session are followed, the public must have "access to contemporaneously hear all discussions, testimony, and roll call votes".

This ruling came about following a village board meeting for the Village of Roanoke. The meeting was being held virtually via the Zoom platform. During the meeting, the mayor needed to have a "side bar" and speak briefly with the village clerk to determine if it would be appropriate to address a personnel matter in open session or hold it for executive session. He asked another trustee to mute all of the microphones for Zoom, spoke with the clerk for about 60 seconds, and ultimately decided to address the personnel matter in executive session. They did in fact hold an executive session and did address the matter there.

The Village argued this was a brief and limited discussion for the sole purpose of clarifying a procedural issue. There is nothing in the OMA that prohibits a member of the village board and another village official from having a brief, inaudible discussion during an in-person meeting. Notwithstanding this, the Village was found in violation. The reason was the strict letter of the law as amended. The OMA was amended in June 2020 to allow for virtual meetings. Section 7(e)(4) of the Act requires any virtual platform "to allow any interested member of the public access to contemporaneously hear all discussion, testimony, and roll call votes". By muting the audio, even briefly for a procedural reason, the Village violated the OMA.

Supreme Court Finds CPD Police Records Must Be Maintained Despite CBA Provision for Destruction

City of Chicago v. Fraternal Order of Police, Chicago Lodge 7, 2020 IL 124831

This case presents the sole issue of whether a provision in a collective bargaining agreement ("CBA") requiring destruction of disciplinary files after five years violates public policy.

This case had a lengthy procedural history. Since January 1981, the City of Chicago ("City") and Fraternal Order of Police, Chicago Lodge 7 ("FOP") were parties to a CBA, including §8.4, mandating the destruction of disciplinary investigation records, such as complaint register files prepared by COPA and Chicago Police Department ("CPD") Internal Affairs Division involving allegations of alleged misconduct by members of the CPD. The provisions of §8.4 have remained substantially unchanged since the 1981 CBA, despite numerous attempts by the City to eliminate or modify the provision. Section 8.4 requires destruction of those records after "five years from the date of incident or the date upon which the violation is discovered, whichever is longer."
In 2011 and 2012 FOP filed two grievances over the City's failure to destroy complaint register files in extending beyond the five year period. In October 2014, the City notified FOP it intended to comply with FOIA request from the Chicago Tribune and Chicago Sun Times for information related to complaint register files dating back to 1967. What followed was a lengthy history of court

challenges and entry of a preliminary injunction enjoining the City from releasing files more than four years old.

Enter the United States Department of Justice ("DOJ"), which opened a civil pattern and practice investigation of the CPD focusing on allegations of excessive force and discriminatory policing. DOJ sent the City a document preservation request, requesting the City and CPD preserve all existing documents "related to all complaints of misconduct against CPD officers." In January 2016, the arbitrator issued an interim award finding the City violated §8.4 of the CBA and directed the parties to attempt to negotiate a procedure for compliance. In February 2016, the DOJ sent letters to the City requiring the City to preserve all documents relating to complaints of misconduct for the duration of the pattern and practice investigation.

What followed was a series of supplemental arbitration awards and court proceedings. In October 2017, the Circuit Court granted the City's Petition to Vacate the Final Arbitration Award and denied FOP's counter petition to enforce the award, ruling enforcement of the arbitrator's award "violated a well-defined and dominant public policy to preserve government records." The FOP appealed and the Appellate Court affirmed holding the Local Records Act, the State Records Act, and FOIA established the well-defined public policy requiring retention of important public records for access to the public. FOP filed a Petition for Leave to Appeal with the Illinois Supreme Court.

The majority of the Illinois Supreme Court analyzed this case under the "public policy" exception to arbitration awards under the Illinois Public Labor Relations Act. Under the public policy exception, a Court may set aside an arbitration award if it is "repugnant to establishing norms of public policy." This exception is a narrow one and is invoked only when a party clearly shows enforcement of the contract, as interpreted by an arbitrator, contravenes some explicit public policy.

The Court applied a two-step analysis. The first inquiry is whether a well-defined and dominant public policy can be identified through a review of the Constitution, statutes and relevant judicial opinions. If the Court is satisfied as to the existence of the well-defined and dominant public policy, the Court must then determine whether the arbitrator's award, as reflected in his interpretation of the agreement, violated public policy.

As the first step of the analysis, the Court reviewed the provisions of the Local Records Act and the State Records Act. A review of the State Records Commission's duties and responsibilities under the State Records Act persuaded the majority to conclude there is a "well-defined and dominant public policy rooted in state law concerning the procedures for the "proper retention and destruction of governmental records." In this analysis, the majority apparently did not need to consider the provisions of FOIA.

Having found a "well-defined and dominant public policy," the Court then turned to the question of whether the arbitrator's award violated that public policy by enforcing compliance with §8.4 of the CBA. The Court noted, as written §8.4 only requires disciplinary documents will be destroyed after a finite period of time. Section 8.4 does not take into consideration "whether the records do not have sufficient administrative, legal or physical value to warrant their further preservation" as required under the Local Records Act. In addition, the Court found §8.4 of the CBA did not require the parties to be bound by the decision from the records commission. Moreover, §8.4 makes no reference to any of the mandatory review procedures as set forth in the Local Records Act.

Accordingly, the majority held as follows:

"The arbitrator erred in finding that §8.4 is consistent with state law and not contrary to state public policy, thereby mandating the parties to comply with the destruction of all discipline records covered under this provision. Consequently, the award is void and not enforceable."

The Court held the arbitration award violated an explicit well-defined and dominant public policy and affirmed the judgment of the Circuit Court vacating that award, affirming the judgment of the Appellate Court.

Justice Kilbride authored a dissenting opinion. Justice Kilbride prefaced his dissent by recognizing, "the issue of police misconduct is a serious issue that must be confronted by society." Justice Kilbride seemed to weight the competing public policy of the State to enforce collective bargaining agreements and labor arbitration awards against the public policy relied upon by the majority. Justice Kilbride believes the two public policies can "coexist harmoniously and that this arbitrator's decision may be construed so as not to create a conflict between those policies."

Justice Kilbride believed the arbitrator's award simply directed the parties to negotiate the method and procedure for the possible future destruction of eligible records in compliance with §8.4 of the CBA. Justice Kilbride pointed out that the arbitrator did not mandate destruction of all records. Justice Kilbride also placed emphasis on provisions of §15 of the Illinois Public Labor Relations Act, establishing a public policy supporting collective bargaining and the enforcement of labor arbitration awards.

Justice Kilbride concluded:

"Based upon the parties' briefs and comments during oral argument, it is readily apparent that the parties are fully aware of the requirements of the Local Records Act, other applicable statutes, and the consent decree. Thus we can safely assume that negotiations for the possible future destruction of any eligible discipline records would have been done in full compliance with the consent decree and any other requirements by law. I believe the parties should be allowed to meet and negotiate in accordance with the arbitrator's directive."

FOIA Applies to Personal Email and Texts of Public Officials

Better Government Ass'n v. City of Chicago Office of Mayor, 2020 IL App (1st) 190038

The main issue in this case was whether text messages and e-mails sent from public officials' personal accounts qualify as public records under FOIA. Back in 2016, the BGA made two FOIA requests seeking "any and all communication" between the Chicago Department of Public Health and the Mayor's office related to lead in the drinking water at Chicago Public Schools.

The City did not comply with the request and made no effort to ask its officials if they had any responsive records within their personal emails or text messages. At the trial level, the Circuit Court ordered the City to make inquiries of their officials concerning their personal emails and text messages, and supply affidavits from them. The City appealed but lost again. The Appellate Court held that "*communications pertaining to public business within public officials' personal text messages and e-mail accounts are public records subject to FOIA … Accordingly, we affirm the*

order of the circuit court directing defendants to inquire whether the relevant officials used their personal accounts for public business."

The Court's ruling was consistent with a prior opinion from the Public Access Counselor, (PAC 16-006; Request for Review 2016 PAC 41657). This underscores the need to use caution with personal phones and emails. If a communication pertains to public business, and comes to you in your public capacity, it is probably subject to FOIA. Following a FOIA request, you could be required to search your personal accounts, turn over any responsive information, and provide an affidavit as to the presence or absence of any responsive information.

Chicago City Council Violated Open Meetings Act During COVID Conference Calls

2020 PAC 62981

In a non-binding opinion, the Public Access Counselor (PAC) at the Attorney General's Office has found the Chicago City Council violated the Open Meetings Act (OMA) by gathering via video/phone conference on several occasions with Mayor Lightfoot to discuss issues related to the City's COVID response.

At issue were four meetings held via video or conference call wherein the Mayor's office shared COVID information with the aldermen. A majority of a quorum of the city council was present at three of the four meetings in question. While no city council action was taken during these meetings, discussion was held regarding the City's COVID response. No agendas were posted, the public was not able to participate, and no minutes were taken. The City council later took action related to several of the matters discussed.

In response to the OMA complaint filed by a news organization, the City referred to these gatherings as "briefings" as opposed to meetings. It further averred the OMA did not apply because the alderman did not attend in their legislative capacity but rather only in their capacity as "community-based first responders". It argued no deliberation occurred and the matters discussed were not "public business". Rather, the aldermen participating in the call were there to receive the most current information on the City's COVID response to share with their constituents. As such, no "meeting" was held as defined by the OMA.

In finding the City violated the OMA, the PAC first found, "when a majority of a quorum of aldermen gather to participate in a discussion about the City's response to a crisis such as the current pandemic, they do so as the legislative body of the City of Chicago even if they do not vote or otherwise take final action on how to respond."

As to the City's argument no "meeting" occurred inasmuch as no deliberation was held, the PAC noted prior opinions and case law holding "discussing public business" under the OMA is broadly construed and includes discussion and exchange of facts prior to making a decision. The PAC held, "Thus, 'public business' includes not only those subjects on which public bodies take action during a gathering, but also the information exchanged relating to matters that public bodies would potentially act upon in the future, regardless of whether action concerning the information is ultimately taken." In short, whether formal action is taken is not determinative of whether a

"meeting" occurred under the OMA inasmuch as discussion of public business is sufficient in and of itself to trigger the requirements of the Act.

Ultimately, the PAC concluded the City violated the OMA requirements to post an agenda, hold the meeting at a time and place open to the public, allow for public comment, and keep minutes of all meetings.