

July 2011

## Legal and Legislative Update

### CASES

1. *Lindemulder v. Board of Trustees of the Naperville Firefighters Pension Fund*, 946 N.E.2d 940, 349 Ill.Dec. 444 (Second Dist 2011) . Without expressly saying so, the Second District Appellate Court clarified that the heart/lung provisions of §4-110.1 of the Illinois Pension Code *does not* create a rebuttable presumption for firefighters seeking occupational disease disability pensions under the heart/lung provisions of §4-110.1.

The Applicant in *Lindemulder* sought a line of duty, and in the alternative, an occupational disease disability pension as a result of chronic obstructive pulmonary disease (“COPD”). The Applicant argued that various occupational exposures over the course of his career caused his COPD, including exposure to diesel fumes, and possibly mold in one of the fire stations where he worked.

The Applicant was examined by three physicians selected by the Board. All three physicians concluded that the Applicant was disabled, but opined that the disability was the result of his tobacco use. The doctors submitted written reports and testified concerning their opinions and conclusions. All three physicians concluded, because of his cigarette smoking, the Applicant would have the same condition regardless of his employment as a firefighter.

In light of the doctors’ opinions, the Pension Board denied the Applicant’s request for line of duty and occupational disease disability benefits, but awarded him a non-duty disability pension. On administrative review, the Circuit Court affirmed the Pension Board’s decision. The Applicant appealed. The Appellate Court first addressed the line of duty claim, applying the manifest weight of the evidence standard. The Court found all physicians concluded that cigarette smoking, rather than plaintiff’s alleged occupational exposure, caused his disability. Moreover, one physician concluded that Applicant’s alleged aggravation of his COPD by exposure to fire smoke and diesel fumes caused a deminimis aggravation of this COPD, which the Applicant alleged was

sufficient to prove his case. The Court rejected the claim that a de minimis aggravation, i.e., a transient one with no permanent effect, was sufficient to entitle him to a line of duty disability pension. Finally, the Court concluded that the Applicant's assertions about his exposure to fire smoke and diesel fumes were mostly "unproven." The Appellate Court affirmed the Pension Board's denial of the Applicant's request for a line of duty disability pension.

*Lindemulder* is the first reported Illinois Appellate Court decision that addresses the standard for proving eligibility for an occupational disease pension under the heart/lung provisions of §4-110.1 of the Illinois Pension Code. The Applicant's theory was that the following language used by the legislature was sufficient to entitle the firefighter to an occupational disease disability pension:

"service in the fire department requires firefighters in times of stress and danger to perform unusual tasks; that firefighters are subject to exposure to extreme heat or extreme cold in certain seasons while performing their duties; that they are required to work in the midst of and are subject to heavy smoke fumes, and carcinogenic, poisonous, toxic or chemical gases from fires; and that these conditions exist and arise out of or in the course of employment."

According to the Appellate Court, the Applicant in this case was simply seeking to bootstrap those legislative findings into proof of causation. The Court rejected this argument because the legislature specifically provided that a firefighter subject to those conditions must prove that his or her disability "resulted from service as a firefighter."

Prior to this case, many had assumed that a firefighter seeking a disability under the heart/lung provisions of §4-110.1 simply had to establish that they suffered a disease of the heart and lung, etc., that they were disabled, and that they had more than five years of creditable service. This case rejects that assumption. While not specifically stating so, the Court essentially held that there is no rebuttable presumption contained in the heart/lung provisions of §4-110.1 of the Pension Code. This does not mean that firefighters will not be able to obtain an occupational disease disability pension under §4-110.1. Instead, it requires pension boards to evaluate applications based upon the facts of each specific case. However, it must be noted, there is a rebuttable presumption in favor of firefighters contained in the cancer portion of §4-110.1 of the Pension Code.

2. *Filskov v. Board of Trustees of the Northlake Police Pension Fund*, 946 N.E.2d 1095, 349 Ill.Dec. 599 (First Dist. 2011). In *Filskov*, an officer was on duty and in uniform as a member of the Northlake Police Department assigned to an unmarked police vehicle along with two other officers assigned to a gang suppression unit. After finishing up either an arrest or a report at the Police Department, the three officers left the building to return to the unmarked squad car, but had yet to resume patrol. They were

not acting in response to a call for service. The officer was standing outside the open door of the squad car, another officer inadvertently put the car in drive and drove over the officer's foot. As a result of the injuries to his foot, the officer applied to the pension board seeking line of duty disability benefits, or in the alternative, non duty disability benefits. Following a hearing, the pension board issued its written decision and order, denying the line of duty disability application, but granting the non-duty disability claim. The pension board found that "the performance of a act of duty" did not cause or contribute to the officer's disability under the pension code. The pension board concluded that there was no "special risk" as required under case law.

On administrative review, the Circuit Court reversed, awarding the Applicant a line of duty disability pension. The Pension Board appealed. The Appellate Court concluded that the case was a mixed question of law and fact involving an examination of the legal effect of a given set of facts, and applied the "clearly erroneous standard." The clearly erroneous standard means that an administrative agency's decision will be deemed "clearly erroneous" only where the reviewing court, on the entire record, is left with a definite and firm conviction that a mistake has been committed. The court went on to review various Illinois Supreme and Appellate Court decisions involving determination of what constitutes a line of duty disability pension within the meaning of §3-114.1 of the Illinois Pension Code.

The majority distinguished those cases in which police officers were awarded line of duty disability pensions, from this case. The court concluded the board was not clearly erroneous because the incident in question, entering the vehicle, did not involve "special risk not assumed by a citizen in ordinary walks of life." According to the officer's own testimony, he was not responding to a call, he had yet to resume patrol duties, but rather was attempting to enter the rear seat of a car that was still in the police station parking lot. He was standing outside the car moving items off the seat when the incident occurred. The court concluded that the officer was engaged in an ordinary risk that all citizens assume when they enter a vehicle or move items off the seats of vehicles. Further, according to the majority, the capacity in which he was acting was that of a passenger entering a motor vehicle, not that of a police officer.

Accordingly, the majority affirmed the decision of the pension board. Justice Cunningham dissented, concluding that the various cases cited supported the finding that the officer was performing an act of police duty and that the board and majority focused on the fact that the officer was not facing a specific danger at the precise moment of injury. A petition for leave to appeal has been filed with the Illinois Supreme Court.

## LEGISLATION

### 1. The Illinois Civil Union Act

On January 31, 2011, Governor Quinn signed Public Act 961513, 750 ILCS §75/1 et seq., effective June 1, 2011. The Civil Union Act now permits a marriage between persons of the same sex, creating a relationship which is substantially similar to marriage. Parties over the age of 18 can obtain “civil union certification” in a manner substantially similar to a common law marriage. Officers or firefighters who enter into a “civil union” obtain the status of spouse, “entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses....”

In the opinion of the authors, police officers and firefighters who enter into a valid civil union, will be entitled to the same legal status as spouses for purposes of surviving spouse/survivor benefits. Civilly united couples will also have the ability to obtain a Qualified Illinois Domestic Relations Order (“QILDRO”), in the event of dissolution of the civil union. We will be following the developing law and keep you apprised. In the interim, should your pension board receive any inquiries concerning civil unions, we suggest that the pension board obtain a certified copy of the civil union certificate and place that on file in the officer or firefighter’s pension board file in the event of a death and/or dissolution of that civil union.

### 2. House Bill 1872 - Permits Transfer of Creditable Service from Article V Fund to Article III Fund

The Illinois Legislature passed House Bill 1872, creating new provisions for Article III (5/3-110.11) and Article V (5/5-237.5) This Bill was sent to Governor Quinn on June 15, 2011. Governor Quinn will have sixty (60) days to either veto the bill or it will become law. This bill creates a very short sixty (60) day window period after the effective date of the Act, and allows officers to transfer up to ten (10) years of creditable service from an Article V (Chicago Police Pension Fund) to an Article III Pension Fund (Downstate Police). An officer seeking to transfer from Article V to Article III can reinstate previous service with Article V by paying the Chicago Police Pension Fund the amount of refund plus interest at an actuarial assumed rate of six percent (6%) compounded annually from the date of refund to the date of repayment.

Upon receipt of the repayment and written application, the Chicago Police Pension Fund shall pay to the Article III fund the following amounts.

- 1) The amounts credited to the officer through employee contributions, plus accumulated interest; plus

- 2) The amount representing municipality contributions, equal to the amount determined under item 1); plus
- 3) Any interest paid to the Chicago Fund in order to reinstate credits and creditable service.

The officer will be required to pay the Article III Fund an amount determined by the board equal to:

- 1) The difference between the amount of the employee and employer contributions transferred to the Fund under §5/5-237.5 and the amounts that would have been contributed had such contributions been made at the rates applicable to an employee under Article III, and
- 2) Interest at the actuarially assumed rate compounded annually from the date of service to the date of payment.

Once again, the Legislature did not provide pension boards with much guidance on how to effectuate the transfer. We suggest that any pension boards that have officers who wish to transfer creditable service from their time as a Chicago Police Officer be advised to contact the Chicago Retirement Board as well as their own board to begin the transfer process, in light of the limited sixty (60) day application period. We anticipate that the Illinois Department of Insurance will be preparing either administrative rules and regulations or providing further information by way of its Siren newsletter.

Please do not hesitate to contact any of us should you have any questions concerning these cases and/or legislation.

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