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IPPFA RECENT LEGAL DEVELOPMENTS

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1.

**Illinois Supreme Court Holds Surviving Spouses of Police Officers
Not Entitled to Cost of Living Increases**

On March 19, 2009, the Supreme Court of Illinois issued its Opinion in **Roselle Police Pension Board v. Village of Roselle, 232 Ill.2d 546, 905 N.E.2d 831 (Ill.Sup.Ct.2009)**. Unfortunately, the court ruled that a pension board lacks the statutory authority to award surviving spouses of police officers cost of living increases.

A number of pension boards have granted cost of living increase benefits under the theory that the Statute was ambiguous and that principles of liberal construction permitted the pension board to award surviving spouses of police officers cost of living increases. The Illinois Department of Professional Regulation, Division of Insurance rendered an opinion that the Board lacked the statutory authority to grant such increases and the Village of Roselle and its attorneys, embarked on a crusade to have the court declare such cost of living increases impermissible under Article III of the Illinois Pension Code. Unfortunately, they prevailed.

The following organizations and attorneys filed briefs *amicus curiae* in support of our position: Illinois Public Pension Fund Association (Richard and Laura Puchalski), Metropolitan Alliance of Police (Joseph Mazzone), and Fraternal Order of Police Labor Council (Heidi Parker). These organizations stood together when it mattered. They should be applauded for doing so. The Roselle Police Pension Board and this Firm fought and lost the battle, but in our opinion, it was a battle worth fighting.

Despite the Supreme Court's decision, **Sola v Roselle Police Pension Board, 342 Ill. App.3d 227 (2d Dist. 2003)**, stands for the proposition that those previously granted increases should continue, as the board lacks the statutory authority to amend or modify a previous decision to grant cost of living increases. However, based on the Illinois Supreme Court's Decision, no further surviving spouses are eligible for cost of living increases.



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2.

Public Safety Employee Benefits Act Case

DeRose v City of Highland Park, 386 Ill. App.3d 658, 898 N.E.2d 1115 (2nd Dist. 2008).

Police officer with the Highland Park Police Department with eight (8) years of service responded to an activated residential burglary alarm that had been triggered, apparently during a severe storm. While on the call, the Applicant slipped and fell and sustained a disabling injury to his shoulder, resulting in the Pension Board awarding a line of duty disability benefit. Thereafter, the officer applied to the City for benefits under the Public Safety Employee Benefits Act (PSEBA), requiring the City to pay the officer's health insurance premiums.

The Parties proceeded to a bench trial. At the trial, the Plaintiff testified that once he received the call he responded as quickly as he could in a safe manner; that he did not activate the siren or overhead lights on his police vehicle because doing so might have alerted any intruders to the residence that he was approaching. Plaintiff acknowledged that there was a thunderstorm, and there was very little lightning when he parked the squad car near the front of the residence. Plaintiff further testified that there was no backup officer because the Department was understaffed that evening. He testified that he proceeded to the back of the house after checking the front, and noticed a wooden deck which led to a sliding glass door. As Plaintiff approached the sliding glass door looking for movement in the house, he slipped and fell injuring his shoulder. The Plaintiff continued his investigation determining that the alarm was a false alarm. On cross examination he did not un-holster his firearm during his investigation. The City entered evidence that the City of Highland Park Police Department received numerous calls in the preceding years and that less than 1% of the calls were "bona fide". Further testimony was introduced that on the night of the incident, the Department received more than twenty (20) alarm calls which was not an unusual number during a power outage or a strong storm. The Plaintiff's Commander testified that he did not consider panic alarms to always constitute emergencies because they were overwhelmingly false. The trial court ruled that the Plaintiff reasonably believed he was responding to an emergency at the time he was injured, because the alarm required "immediate action". The City filed an appeal.

On appeal the court was tasked with determining the meaning of "emergency" as used in PSEBA, which was not defined by the Legislature. The City argued that emergency means "the urgent need for assistance or relief" or "an unforeseen combination of circumstances that calls for immediate action". The officer proffered a dictionary definition of the term as "a sudden condition or state of affairs that calls for immediate action". The court relied upon yet another dictionary definition which defines emergency as "an



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unforeseen combination of circumstances or the resulting state that calls for immediate action". Thus the court reasoned that, for purposes of PSEBA an emergency is where it is "urgent and calls for immediate action".

Applying the facts to that definition, the court soundly rejected the City's argument that the officer was not responding to an emergency because he did not use his overhead lights and did not call for a backup officer. The court concluded that to accept the City's approach, even if the call was eventually determined not to be bona fide, the officer investigating the call cannot know whether it is bona fide until he has completed his investigation. Until the officer is able to eliminate the possibility of danger, even if remote, he must conclude the call requires his immediate attention and thus the call presents an emergency. The court further reasoned that to accept the City's approach, officers would have to delay their responses to potentially dangerous situations based on the notion that many similar situations were not bona fide. Secondly, the City would have the statistically likely outcome of a call control whether the call is an emergency regardless of what actually happens on the call. The court held that a call requires an officer's immediate response as an emergency, until the officer eliminates the possibility that the call is bona fide.



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3.
QILDRO – Division of Benefits Case

In Re Marriage of Winter, 387 Ill. App.3d 21, 899 N.E.2d 1080 (1st Dist. 2008).

Winter was a retired member of the Public Teacher's Retirement Fund of Chicago (pension fund) involved in a bitter divorce dispute which resulted in him fleeing to England with the parties' child. Mr. Winters refused to sign a Consent to Issuance of a Qualified Illinois Domestic Relations Order (QILDRO) or a Qualified Domestic Relations Order (QDRO). Given the fact that the entry of a QILDRO was not possible without Mr. Winter's consent and the court's contempt powers could not reach Winter in England, the court concluded that the spouse had no adequate remedy at law and entered a preliminary injunction, compelling the Pension Fund to freeze Winter's retirement benefits and hold those benefits in trust until the benefits could be apportioned by the court, and thus preventing Winter from dissipating the assets previously adjudicated to be marital property (*i.e.*, pension benefits). The Pension Fund was not made a party to the suit and did not receive notice and upon learning of the entry of the preliminary injunction freezing Pension Fund assets, filed a petition to intervene.

In a lengthy opinion, the Appellate court reviewed the action of the trial court entering the preliminary injunction. Among the numerous arguments made by Mr. Winter and the Pension Fund, the most significant was the two arguments that were raised that the preliminary injunction deviated from the Pension Code and case law and that issuance of the preliminary injunction violated Mr. Winter's rights. First the court rejected Winter's contention that his rights were impaired or diminished under the Illinois Constitution because the total amount of his pension was unaffected. Winter's full pension payments were sent to a trustee, who was required to remain in possession of the funds until further order of the court. Reasoning that the order curtails Winter's access to his pension, it was temporary in nature, and it prevented his wrongful receipt of his share of pension benefits to the detriment of his wife. Finally, the court rejected the argument raised by Winter and the Pension Board that the anti-alienation provisions contained in Article 17 of the Pension Code prohibited the court from entering a preliminary injunction against the Board. Drawing upon the equitable powers of the court, the court affirmed the trial court, holding that the court had the power to correct an ongoing wrongdoing by Mr. Winter to do justice between the parties, as Winter was not free to turn to the protection afforded by Section 17-151 of the Pension Code into a sword to keep his wife at bay from that portion of Winter's pension payments to which she is entitled to under the judgment of Dissolution of Marriage. Accordingly, the court found that there was no deviation from the Pension Code or case law.



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In Re Marriage of Rafferty - Plunkett, 392 Ill. App.3d 100, 910 N.E.2d 670 (3rd Dist. 2009).

Marie and Patrick Plunkett became yet another unhappily divorced couple destined to make case law suitable for inclusion in this portion of the training seminar. Patrick was a member of the State University's Retirement System (SURS). The trial court entered a judgment order dissolving the marriage and as part of the dissolution order approved as fair, just, and equitable an oral agreement incorporating a provision that Marie was to be awarded 50% of Patrick's pension plan benefits acquired during the marriage, which provided that Patrick had been receiving. Patrick apparently moved to Ireland and failed to sign a Consent to Issuance of a Qualified Illinois Domestic Relations Order and failed to live up to his end of the bargain, by not paying Marie pursuant to the Dissolution Judgment Order.

The trial court entered a Rule to Show Cause against Patrick for his failure to pay benefits and entered judgment in the amount of \$68,374.00 and ordered Patrick to execute a Consent to Issuance of a QILDRO. Marie then issued citations to discover assets to various banks and brokerage firms and SURS, and requested the court issue a turnover order to SURS to turnover certain assets. The Trial court granted SURS Motion to Dismiss the citation to discover assets and denied Marie's Motion for a turnover order directed at SURS. The trial court found that Patrick had not executed a Consent to Issuance of a QILDRO and that the trial court was without statutory authority to otherwise override the exemption provision of the Pension Code and the Illinois Code of Civil Procedure. Marie appealed.

On appeal the court embarked on a detailed analysis of case law involving public pensions and dissolutions of marriage similar to the approach in *Winter*, cited *supra*. Once again relying on the equitable powers of the court, the court reversed the decision of the trial court and held that the trial court had the authority to enforce the voluntary fair, just, and equitable oral settlement agreement, acknowledging that Patrick signed the written Settlement Agreement, in which he consented to an award to Marie of 50% of his pension plan benefits acquired during the marriage. Patrick's written and oral consent, even though not reduced to an actual consent and QILDRO, was sufficient to constitute substantial compliance with the directive of §1-119m-1 of the QILDRO Legislation. Therefore the court had the authority to direct SURS to make pension payments directly to Marie.



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4.

Jurisdiction to Modify Pension Board Decision

Board of Education of the City of Chicago v. Board of Trustees of the Public Schools' Teachers' Pension and Retirement Fund of Chicago, (Retired Teachers Association of Chicago Intervening Plaintiff-Appellee). No. 1-08-1517. Slip Op. Aug. 20, 2009 (1st Dist. 2009)

On January 24, 2005, the Board of Education (Board) filed a complaint against the Trustees. The Board alleged that from July 1999 to July 2004, the Trustees paid pensions to certain newly retired teachers on a basis not authorized by the Illinois Pension Code (Pension Code) (40 ILCS 5/1-101 *et seq.* (West 2006)), resulting in overpayments from the Public Schools Teachers' Pension and Retirement Fund of Chicago (Fund) to the affected retirees. The Board alleged that the Pension Code requires the Board to make up shortfalls when the Fund's assets drop below 90% of its total actuarial liabilities. This Complaint was filed more than 35 days after the awards were made.

Here, the Board sought leave to amend its Complaint to show that, in awarding teachers pension credit, the Trustees essentially "rubber-stamped" the recommendations of its staff, without conducting hearings or analysis of the staff's calculations. Thus, the Board argues that this case does not involve "administrative decisions" as defined by the statute, but challenges a general policy that went unchallenged in the underlying pension proceedings.

Count I of the complaint sought a declaration that the Trustees had violated the Pension Code by using an unauthorized method of calculating average salaries for teachers receiving 22 paychecks per year, as opposed to those receiving 26 paychecks per year. Count II sought an accounting. Count III sought an injunction ordering the Trustees to discontinue and remedy past overpayments.

On October 12, 2006, the Board filed a motion for summary judgment on counts I and II of its complaint. On June 15, 2007, following briefing and a hearing, the circuit court granted the Board's motion, ruling that the Trustees had overpaid teachers receiving 22 paychecks per year, in violation of the Pension Code. The case was set for further proceedings regarding an accounting and remedy.

On July 18, 2007, the Retired Teachers sought leave to intervene in the case, which the trial court granted on July 31, 2007. The Retired Teachers filed a complaint for declaratory relief on September 4, 2007. The Retired Teachers filed a supporting brief, arguing in part that the Board was barred from seeking relief for failure to seek timely administrative review of the pension awards at issue.



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On December 20, 2007, following briefing and oral argument from the parties, the circuit court entered an order treating the Retired Teachers' brief as a motion to dismiss and dismissing the Board's complaint. The order also set the case for status on the Board's motion for leave to file a second amended complaint. On May 9, 2008, the circuit court denied the Board leave to file a second amended complaint, ruling that no new facts or law was presented that would remedy the defect in the dismissed complaint. On June 6, 2008, the Board filed a timely notice of appeal to this court.

The Appellate Court quoted from a firefighters pension fund case, *Karfs v. City of Belleville*, 329 Ill.App.3d 1198, 770 N.E.2d 256 (2002), at length because it was relevant on certain points that favored the Board. Unlike the other cases cited by the parties, *Karfs* centers on the unusual situation in which a case is brought by a third-party governmental entity whose finances are affected by the actions of a pension board. *Karfs* recognizes that a third party-like the Board in this appeal-may challenge a method of calculation as being prohibited by the Pension Code. *Karfs* also recognizes that such a third party will not have an interest in and standing to seek the review of each individual case that comes before the pension board, but will have standing to challenge the decision regarding the calculation at issue.

Quoting from *Karfs*, "If, for example, in deciding a firefighter's pension benefit, the pension board uses or approves a method of calculation that is prohibited by the Code or violates the labor contract, that decision may be deemed to have a direct impact on a municipality's duty to levy taxes in sufficient proportions to enable the pension system to function, because it is reasonably likely that the pension board would continue to use an improper method to calculate other pensions, resulting in a depletion of the fund. Under those facts, the municipality could seek a review of the agency's decision because the decision potentially impacts the municipality's duty to provide a sufficient sum to meet the requirements of the pension fund. We caution that the pension board's decision must impact a duty or interest of the municipality. A municipality will not have an interest in and standing to seek the review of each individual case that comes before the pension board. Furthermore, a municipality has no authority to review or modify adjudicative decisions made by an administrative agency. See *Board of Trustees of Police Pension Fund v. Washburn*, 153 Ill.App.3d 482, 486-87, 505 N.E.2d 1209, 1212-13 (1987)"

Nevertheless, **Karfs is distinguishable** from the instant facts in one key aspect. *Karfs* suggests that a third party must seek review of the calculation decision within the 35-day period permitted in the Administrative Review Law. However, **Karfs involved an individualized miscalculation, whereas the alleged miscalculation in this case was systemic.**

The Appellate Court held that systemic miscalculation falls outside the definition of an "administrative decision" under the review law. It is not a "decision, order or determination of any administrative agency rendered in a particular case," but a "rule [], regulation[], standard[] or statement[] of



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policy.” 735 ILCS 5/3-101 (West 2006). Moreover, even assuming *arguendo* that the internal procedures producing the alleged miscalculation here were sufficiently quasi-judicial to constitute an “administrative decision,” the review law’s 35-day clock starts when the decision sought to be reviewed is served upon the party affected by the decision, and no such notification appears to have been given to the Board in this case. The Trustees and the Retired Teachers note that members of the Board also are also members of the Trustees, but there does not appear to be any evidence that even those members were notified of the decision to calculate the underlying pensions at issue in this appeal in a particular manner.

Kosakowski v Calumet City Police Pension Fund, 389 Ill. App.3d 381, 906 N.E.2d 689 (1st Dist. 2009).

Calumet City Police Pension Board awarded a police officer a line of duty disability injury as a result of a back injury he sustained while making an arrest. The Plaintiff received full salary and benefits for up to one year or until January 5, 2003 under the Public Employee Disability Act (PEDA). During this time pension calculations were deducted. From the period of January 6, 2003 through April 19, 2004 the Plaintiff received temporary total disability benefits (TTD) under the Workers’ Compensation Act, for which no pension contributions were deducted. The Pension Board awarded a line of duty disability and issued a written decision awarding the Plaintiff line of duty disability benefits based upon 65% of his salary attached to his rank as of January 4, 2003, the day before his PEDA benefits ran. No judicial review was sought by either party of the Board’s written decision.

The Pension Board requested an advisory opinion from the Department of Insurance (DOI) as to the appropriate salary to be use. The Department responded stating that the salary to be used for pension purposes should be the last day the officer was on the payrolls. According to the DOI, if an officer receives PEDA, the salary to be used for pension purposes is the salary the officer was receiving on the last day that contributions were withheld and creditable service was earned. Without affording the Officer a hearing, the Board issued a letter to the Officer advising him that it had miscalculated the benefits, and notified him that his benefits would be reduced from the next twelve (12) monthly pension payments due to an alleged overpayment of \$4,840.56. The Plaintiff sought Administrative Review seeking reversal of the Board’s reduction of his benefits and a demand of repayment of the alleged overpayment and reinstatement of his monthly benefit. The trial court reversed the Pension Board’s recalculation of the Officer’s benefit finding that the Board lacked jurisdiction to make such a modification, since the thirty-five (35) day time requirement for Administrative Review had passed. The Board appealed.

On appeal the Board argued that it made an “error” in the initial calculation of the disability pension to which the Officer was entitled. According to the Board, it calculated the benefit on the last day that the Officer



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received workers compensation benefits, where as it should have calculated the Plaintiff's benefits based upon his salary as of January 5, 2003, the last day he received PEDA benefits, from which pension contributions were deducted. The Board relied on §3-144.2 of the Pension Code which permits the deduction of any amounts of benefits paid due to overpayment, fraud, misrepresentation, or error. No claim was made that the error was a product of fraud or misrepresentation. Interestingly, the court declined to adopt the Rossler court's limited interpretation of error which is quoted in §3-144.2 of the Code, the court was still required to interpret whether an error was made within the meaning of that Statute. The court noted that although the Department of Insurance is authorized to render advisory opinions, the Statute does not mandate that a Pension Board follow or adopt those recommendations. In computing the Officer's disability benefits, the Board interpreted the phrase "at the date of suspension of duty" to mean the last date the Plaintiff worked. However, after the DOI opinion, the Board interpreted §3-144.2 that the Officer's benefits should have been calculated based upon his salary as of the day he received PEDA benefits from which pension contributions were deducted. The court held that the Pension Board's error did not qualify as an error, which should be quoted within the meaning of §3-144.2 of the Act. The Board made no mathematical error in its calculation, rather the Board's claim of error was premised on its reinterpretation of §3-114.2 following the DOI advisory opinion.

The court held that the Board's changes in interpretation of the Code based upon the DOI recommendation did not constitute error which was quoted within the meaning of §3-114.2 of the Act. The court also commented that the Pension Board should have afforded the Officer procedural due process before attempting to modify the Officer's disability pension, meaning that he should have received notice and afforded a hearing. The judgment of the trial court was affirmed.

Harrisburg Police Pension Board et. al. v Harper, No. 5-08-0352, SlipOp.Sept. 8, 2009 (5th Dist. 2009)

The Illinois Department of Insurance (DOI) conducted an audit on the Harrisburg Police Pension Board. In its audit summary of findings, the audit concluded that certain original pension determinations were made which mistakenly included in beneficiaries salaries a \$6,000.00 retirement incentive and in one case, a clothing allowance, which according to the DOI resulted in greater payments to those beneficiaries than their actual salaries justified. Following receipt of the audit, the treasurer wrote to the Pension Board, recommending that the trustees change the beneficiaries' benefits to comply with the DOI audit and requested direction from the Board. When the treasurer received no response to his letter, he unilaterally adjusted the pension payments to reflect the figures as calculated by the DOI. The Pension Board then filed for a *writ of mandamus*, seeking to compel the treasurer to reinstate the beneficiaries' retirement amounts. The trial court entered an order for *mandamus*, the treasurer appealed.



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A writ of *mandamus* commands a public officer to perform an official, non-discretionary duty that the petitioner is entitled to have performed and that officer has failed or refused to perform (*citation omitted*). Here, it was undisputed that the treasurer was a public officer and that the duty is ministerial (*i.e.*, no exercise of discretion is involved). The court reviewed various provision of Article III of the Illinois Pension Code, which reflected that it was the pension board, not the treasurer that had the exclusive authority to administer the pension fund and to pay benefits (40 ILCS §5/3-128). Further, the trustees have a duty to order pension payments and other benefits (40 ILCS §5/3-133). The treasurer is only authorized to hold or pay out money following the direction of the pension board trustees (40 ILCS §5/3-132).

The treasurer attempted to defend his actions by relying upon §5/3-144.2 of the Pension Code, allowing deductions from future payments due to overpayment, due to fraud, misrepresentation, or error. The court noted that to the extent that the Pension Code authorizes corrections for overpayments, etc., it gives authority to the trustees not the treasurer. The court rejected the treasurer's argument that §5/3-144.2 justified the actions of the treasurer or should that provision defeat the pension board's action for *mandamus*. Parenthetically, the court noted that the treasurer could have filed a counter-claim seeking affirmative relief, but declined to decide that issue as it was not properly pled. Would the decision have been different?



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5.
Pension Spike Cases

Kocek v Board of Trustees of the Tinley Park Police Pension Fund, Cook County Case No.: 07 CH 7152; First District Appellate Court No.: 09-0806

On November 11, 2005, the Plaintiff informed the Pension Board that he intended to retire. The Plaintiff retired on January 14, 2006 and received a retirement pension. On May 17, 2006, the Plaintiff and the Village Treasurer attended a Pension Board meeting to discuss a retroactive salary increase that would increase the Plaintiff's pension. On that date, the Pension Board granted the Plaintiff an increase in his pension and the Plaintiff received his increased pension on May 25, 2006. On November 10, 2006, the Pension Board notified the Plaintiff that his pension amount was incorrect and that the Pension Board intended to hold a hearing to reduce the Plaintiff's pension benefit. On August 1, 2007, the Circuit Court granted the Plaintiff's motion for a preliminary injunction enjoining the Pension Board from holding a hearing to reduce the Plaintiff's pension benefit.

The Court held the Pension Board lacked jurisdiction to review or modify its May 17, 2006 decision to increase the Plaintiff's pension because the 35-day administrative review period had expired. The Pension Board argued however, that Section 3-114.2 of the Pension Code permitted the Pension Board to hold a hearing. Section 3-144.2 permits the "...amount of any overpayment, due to fraud, misrepresentation or error, of any pension or benefit granted under this Article may be deducted from future payments to the recipient of such pension or benefit."

The Court held that the Pension Board failed to establish fraud or misrepresentation on the part of the Village. The Court also held that even if the Pension Board established fraud on the part of the Village, Section 3-114.2, as interpreted by the Rosslar case, did not apply because that section has been interpreted to require a showing of fraud or misrepresentation by the claimant (ie. Plaintiff). The Court held the Pension Board did not show fraud by any party. Therefore, the Court granted the Plaintiff's motion for a permanent injunction enjoining the Pension Board from holding a hearing to determine whether to reduce the Plaintiff's pension. The Court denied the Pension Board's motion to dissolve the preliminary injunction. The Plaintiff filed a motion for sanctions against the Pension Board and its attorneys. The Court denied that motion.

The Pension Board appealed the denial of its motion to dissolve the preliminary injunction. The Plaintiff cross-appealed the denial of his motion for sanctions. The parties are currently briefing the issues and a decision is not anticipated until next year.



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Principe v Board of Trustees of the Melrose Park Police Pension Fund, Cook County Case No.: 08 CH 30957.

Prior to November 1, 2006, the Plaintiff was a lieutenant with the Melrose Park Police Department. On November 1, 2006, the Mayor made Plaintiff the “Administrative Aide to the Chief of Police” (“ACCP”). As ACCP, the Plaintiff performed the same job duties he had performed as a lieutenant. On November 16, 2006, the Plaintiff received a \$13,223.42 pay raise to reflect his new role as ACCP. In December 2006, the Plaintiff asked the Pension Board for a computation of his retirement pension. The Pension Board based the Plaintiff’s retirement pension on the Plaintiff’s salary as a lieutenant. Sometime in January 2007, the Village passed an ordinance creating the ACCP position. The Plaintiff retired in April 2007 and requested a pension based on his salary as ACCP. The Pension Board granted the Plaintiff a retirement pension based on his salary as a lieutenant. The Plaintiff filed a timely complaint for administrative review.

The Pension Board determined that the ACCP is not a “rank” for purposes of calculating the Plaintiff’s pension based on “salary attached to rank.” The Pension Board argued that Melrose Park, as a non-home-rule municipality, lacked authority to create an ACCP rank. The Pension Board noted that all promotions in Melrose Park are governed by the Board of Fire and Police Commissioners’ (“BOFPC”) Act. The BOFPC Act allowed the municipality to create only three exempt positions – Police Chief and two Deputy Chiefs. Melrose Park already had one Police Chief and two Deputy Chiefs when the Mayor created the ACCP position. Therefore the Pension Board argued that the Mayor lacked legal authority to create an exempt position called ACCP to which he unilaterally promoted the Plaintiff.

The Pension Board also argued that the Mayor violated the collective bargaining agreement (“CBA”) by creating the ACCP position. The exclusive bargaining unit negotiated all wages for non-exempt positions, including lieutenants. The Pension Board argued the municipality never bargained over the wages for the ACCP and therefore the municipality violated the CBA.

The Circuit Court affirmed the Pension Board’s decision. The Court held that ACCP was not a “rank” recognized by the CBA and it was not an exempt position recognized by the BOFPC Act. Therefore, the municipality lacked authority to unilaterally create the position and establish a corresponding salary. The Pension Board properly based the Plaintiff’s pension on his salary attached to rank as a lieutenant.

The Circuit Court currently has this case under advisement and the parties are waiting for the Court to enter its final order.



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Schultz v Board of Trustees of the Willow Springs Police Pension Fund, et al., Cook County Case No.: 07 CH 2168; First District Appellate Court No.: 08-2770

Sometime in May 2002, the Plaintiff, former Police Chief, wrote a letter to the Village indicating that he intended to retire. The Village granted the Plaintiff a pay increase of approximately \$20,000.00 on November 24, 2002. The Plaintiff retired on December 6, 2002. The Plaintiff received two retroactive pay checks after he retired, reflecting the increased salary.

The Plaintiff contacted the Pension Board's accountant and provided the accountant with his salary information for purposes of calculating his retirement pension. The Pension Board's accountant prepared two separate pension checks based on the increased salary amount. At the time, a former pension board trustee and the Village treasurer signed the two pension checks. The Plaintiff received both pension checks in January 2003. The Pension Board never held a hearing to determine the Plaintiff's salary attached to rank or voted prior to issuing the two checks. The trustee who signed the pension checks later contacted the Pension Board's accountant and asked her to recalculate the Plaintiff's pension based on a the lower salary amount.

In March 2003 the Pension Board notified the Plaintiff that it intended to hold a hearing to formally authorize his retirement pension benefit. In April 2003 the Plaintiff requested an advisory opinion from the DOI. The DOI wrote, "From the information you provided, Mr. Schultz received at least two (2) paychecks based on a salary of \$80,000.00 and received retirement checks based on that salary. If this information is correct, the Pension Division opinion is that Mr. Schultz pension should be based on his salary of \$80,000.00."

The Pension Board held hearings in 2005 and 2006 and issued a Decision and Order finding that the \$20,000.00 increase constituted a bonus that could not be included in salary for purposes of calculating the Plaintiff's pension. The Plaintiff filed a timely complaint for administrative review. The Circuit Court reversed and held that the Pension Board rendered a "final administrative decision" after it issued a check based on the \$80,000.00 salary amount and the Plaintiff received the check. Therefore, the Pension Board lacked jurisdiction to hold a hearing because more than 35 days had passed since it rendered the final administrative decision sometime in January 2003.

The Pension Board appealed to the First District Appellate Court. The Appellate Court has taken the case on the Pension Board's brief only because the Plaintiff did not file a response brief.



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Smith v. Board of Trustees of the Westchester Police Pension Fund, Cook County Case No.: 08 CH 43592, First District Appellate Court No.: 09-0917

On March 23, 2007, the Plaintiff, former Police Chief, wrote a letter to the Village indicating that he intended to retire and requesting a salary increase of approximately \$8,224.00 (Step increase from level 4 to level 6). The Plaintiff believed that he was entitled to the increase because the former Fire Chief had received the same increase upon notification of his intent to retire. On May 1, 2007, the Village granted the Plaintiff his requested pay increase, a 4% increase (3% raise + 1% merit pay) granted to all non-union Village employees, and holiday pay of \$6,177.00. The Plaintiff retired on July 13, 2007. The Plaintiff contended that his salary attached to rank should have been \$113,261.62.

The Pension Board calculated the Plaintiff's salary attached to rank based on his salary (Step level 4) prior to the requested May 1, 2007 increase, the 3% increase given to all employees on May 1, 2007 (the Pension Board did not include the 1% merit pay), and the holiday pay the Plaintiff had received on December 1, 2006. The Pension Board excluded the May 1, 2007 holiday pay amount because the Village always paid holiday pay in December, not May as was done for the Plaintiff. The Pension Board contended that the Plaintiff's salary attached to rank should have been \$103,324.45.

The Illinois Department of Financial and Professional Regulation, Division of Insurance ("DOI") issued two separate advisory opinions regarding this issue. The DOI concluded: "This is clearly a retirement incentive and would not be added to the salary attached to rank for pension calculation purposes." The DOI also wrote that the step increase was "...either a pay spike or a retirement enhancement. No matter how it is labeled, this would not be considered salary for pension purposes."

The Pension Board held a hearing to determine the Plaintiff's salary attached to rank for purposes of calculating his pension. The Plaintiff filed a timely complaint for administrative review. The Circuit Court affirmed the Pension Board's decision. The Circuit Court held that the Pension Board's decision was not clearly erroneous based on "...all of the circumstances of this particular transaction" in the administrative record. The Circuit Court also relied heavily on the DOI's advisory opinions and the fact that the Plaintiff himself requested the increase in anticipation of his retirement.

The Plaintiff appealed to the First District Appellate Court. The parties are currently briefing the issues and a decision is not anticipated until next year.