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The final decision on Illinois pension reform to be issued by the Illinois Supreme Court this spring

by Laura A. Weizeorick

The fate of Senate Bill 1 (Public Act 98-599), the latest effort to resolve Illinois' pension crisis, is expected to be declared by the Illinois Supreme Court before spring ends.

Oral argument in the high profile case was presented to the court's seven justices on March 11, 2015. State Solicitor General Carolyn Shapiro advocated on behalf of the State to allow the pension reform as enacted and permit benefit reductions under the State's police powers as an emergency response to the state's fiscal crisis.

Shapiro's arguments received vocal skepticism from three of the seven justices, Justices Robert Thomas, Rita Garman and Lloyd Karmier. The three justices questioned the ability of the government to reduce public pension benefits in a thirty-year plan to resolve a \$111 billion deficit that the State itself created by substantially short-changing pension contributions over a number of years. The other four justices declined to voice questions or comments.

Attorneys representing unions and other plaintiffs suing to overturn Senate Bill 1 as unconstitutional, contend that the pension clause and the pension benefits are not subject to police powers.

Senate Bill 1 attempts to resolve the State of Illinois deficit by reducing future outlays for a number of public pensions. It reduces benefits by changing the calculations for annual cost of living increases, capping the salary that can be used for pension calculations, raising the retirement age, and changing the actuarial and interest assumptions for the pension system.

Within two months of its enactment in December of 2013, a number of lawsuits were filed in Sangamon County on behalf of teachers and state employees challenging the constitutionality of the Act under the Pension Protection Clause. The Pension Protection Clause in Article XIII, §5 of the Illinois Constitution provides that membership in a state retirement pension is "an enforceable contractual relationship" and that the benefits provided under that relationship "shall not be diminished or impaired." The circuit court of Sangamon County agreed with state employees and held Senate Bill 1 to be unconstitutional. The State appealed.

Although the Illinois Supreme Court often takes months to issue an opinion (an average of 103.7 days after argument for unanimous decisions and 185.5 days for cases with dissents),

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Court upholds prohibitions on receiving disability pensions after resuming related employment

by John E. Motylinski

Two former school administrators who took employment with a private university while still receiving disability pension benefits from the Teachers' Retirement System ("TRS") were forced to repay the benefits they received in *Nuzzi v. Board of Trustees of the Teachers' Retirement System*, 2015 IL App (4th) 140401. In *Nuzzi*, the Fourth District clarified the interplay between two disability provisions applicable to participants in TRS - Sections 16-149 and 16-149.2 of the Illinois Pension Code (40 ILCS 5/16-149; 40 ILCS 5/16-149.2) - and found both provisions to be unambiguous regarding eligibility for disability pension benefits.

Sections 16-149 and 16-149.2 of the Illinois Pension Code allow members of TRS to collect disability benefits and annuities. If a member becomes disabled within the meaning of the Section 16-149, then they can receive a benefit equal to forty-percent of the member's most recent salary or contract rate. However, Section 16-149 benefits are only temporary. Once a member's Section 16-149 benefits run out, they can retire and take a disability retirement annuity under Section 16-149.2.

Importantly, though, both Section 16-149 and 16-149.2 stress that their

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disability benefits will not be paid if the “disabled” member subsequently works in any capacity as a teacher for a private school, college, or university.

Sections 16-149 and 16.149.2 came under fire in the *Nuzzi* case. Thomas and Deborah Nuzzi, the plaintiffs, were both formerly employed by the St. George Community Consolidated School District as high-ranking school officials: Thomas served as the superintendent and Deborah worked as the principal. As a result of their employment, both Thomas and Deborah participated in TRS.

In February 2007, scandal rocked St. George - the Board of Education became aware that Thomas was paying Deborah more than her normal salary and that he was attempting to hide his transgressions by transferring funds between accounts. The Board also learned that Thomas was submitting duplicate reimbursement requests and that he had filed false attendance records with the Illinois State Board of Education.

In response, the Board hired an auditor to conduct a full investigation on St. George’s finances. After the results of the audit confirmed the Board’s suspicions, it placed Thomas on paid administrative leave and ultimately decided not to renew the Nuzzis’ employment contracts.

Thomas and Deborah ultimately sought non-occupational disability benefits through TRS. On January 7, 2008, Deborah had a panic attack while attending a school board meeting. One day later, Deborah’s doctor diagnosed her as having an “overwhelming stress reaction” and concluded that she should not return to work.

In May 2008, Deborah filed an application for non-occupational disability benefits, citing “severe anxiety, panic attacks, migraines, inability to sleep, and inability to concentrate.” Thomas followed suit and filed for disability benefits, complaining of “psychological injury,” “clinical

depression, generalized anxiety, and post-traumatic stress disorder.”

In August and September 2008, TRS approved Thomas and Deborah’s applications and granted non-occupational disability benefits under Section 16-149 of the Illinois Pension Code. After these benefits expired in 2009, TRS notified each plaintiff that they would receive disability retirement annuities under Section 16-149.2 of the Pension Code. Importantly, TRS admonished each plaintiff that they were not allowed to teach for other employers while receiving their disability benefits.

Despite this warning, Thomas and Deborah both took jobs at Olivet Nazarene University as adjunct web-based instructors. Eventually, TRS learned of this and launched an investigation. After confirming that the plaintiffs had been employed in a teaching capacity, TRS notified the plaintiffs that they were no longer eligible to continue receiving their disability benefits.

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most expect an opinion to be issued in this case within 45-60 days of the argument. The court has already recognized the timeliness of the case when it granted an expedited hearing schedule. Moreover, its recent 6-1 decision less than a year ago, in *Kanerva v. Weems*, is widely considered guiding precedent. In *Kanerva*, the Illinois Supreme Court clearly held that health care insurance premium subsidies of state retirees were a pension benefit that the Illinois Constitution prohibited from being cut.

If pension reductions under Senate Bill 1 are similarly held to be unconstitutional, the court’s decision will have significant implications for pension reform and the current fiscal crisis. New Republican Governor Rauner may be forced to make deeper spending cuts than he has already proposing or to change his stance and agree to the demands of many Democratic legislators to increase revenues. Although the court’s ultimate decision on Senate Bill 1 is still unknown, the court’s clear skepticism to the state’s argument and

its prior decision in *Kanerva v. Weems* has left many to speculate that it is just a matter of time before the court finds Senate Bill 1 unconstitutional as well. ■

Attorney Note

Carolyn Clifford is part of a panel discussion on the topic of “The Rise in Psychological Disability Claims in Public Safety Plans” at the National Association of Public Pension Attorneys (NAPPA) conference this June in Austin, Texas.

New laws affecting Illinois firefighter and police pension funds

by Brian J. O'Connor

Several new laws effecting Downstate Police and Downstate Firefighter Pension Funds in the Illinois Pension Code have been enacted since late last summer. Below are highlights of four of these laws.

Note that several other new laws (P.A. 98-0599, 98-0622 and 98-0641) seeking to change statewide and Chicago pension systems were highly debated but approved earlier in the summer and are currently the subject of various levels of judicial scrutiny; these are not addressed in this article.

New Illinois Pension Code Provisions

Surviving child benefits – P.A. 98-0756 (effective July 16, 2014) amended Section 4-114, clarifying the effective date for increase of surviving child benefit from 12% to 20% (40 ILCS 5/4-114(b)).

Investment manager contracts – P.A. 98-1022 (effective January 1, 2015) added new Section 1-113.21 which establishes mandatory disclosures for contracts on or after January 1, 2015 for investment services, consulting services, or commitment to a private market fund, and includes defined terms. This provision is applicable to Article 3 and 4 funds. Additional provisions of this new law also encourage the statewide systems to use “minority investment managers,” but these new provisions do not apply to Article 3 and 4 funds.

Mistakes in Benefits – P.A. 98-1117 (effective August 26, 2014) made corresponding changes to the Downstate Police and Firefighter Pension Codes.

- The law re-wrote Section 3-144.2 and added a similarly new

Section 4-138.10, both of which prescribe how a Fund shall address a mistake in benefit.

- The law changed Sections 3-148 and 4-139 addressing the time limit to correct mistakes in benefit under the Administrative Review Law.

Eligibility Challenges – P.A. 98-1137 (effective June 1, 2015) amended Section 1-115. The amended law now permits the Attorney General to bring a civil action to enjoin the payment of benefits under the Illinois Pension Code against any person who is convicted of any felony relating to or arising out of or in connection with that person's service as a public employee under the Illinois Pension Code.

This is likely a response to the Illinois Supreme Court's ruling that the Attorney General did not have standing to challenge the continuation of former Chicago Police Department Captain John Burge's pension after the Chicago police pension board failed on a tie 4-4 vote to find Burge ineligible for his pension following his federal felony conviction of lying to federal investigators.

Local Records Act Amendments

Two noteworthy changes were made to the Local Records Act (50 ILCS 205/1 *et seq.*). The pension board would logically be considered an “agency” as defined by the Section 3 of the Act where “agency” is defined in part as “all parts, boards, departments, bureaus and commissions of any county, municipal corporation or political subdivision.” Similarly, the trustees would be “officers” where “officer” is defined by the Section

3 of the Act to mean “any elected or appointed official of a court, county, municipal corporation or political subdivision.”

Felony with regards to public records -

Violation of the Local Records Act is now a felony. (P.A. 98-1063, effective January 1, 2015) Section 4 of the Act in pertinent part now provides :

All public records made or received by, or under the authority of, or coming into the custody, control or possession of any officer or agency shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law. *Any person who knowingly, without lawful authority and with the intent to defraud any party, public officer, or entity, alters, destroys, defaces, removes, or conceals any public record commits a Class 4 felony.* (50 ILCS 205/4) [emphasis added]

Website email address – P.A. 98-0930 (effective January 1, 2015) added a new Section 20 to the Act, which requires that:

- a unit of local government or school district that
- serves a population of less than 1,000,000 that
- maintains an Internet website other than a social media website or social networking website

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Additionally, TRS demanded that the plaintiffs pay back the benefits they earned while teaching at Olivet Nazarene because they were “both employed in an equivalent capacity as a teacher in a private university in derogation of Section 16-149.2(a) of the Pension Code.” Instead of paying back the pension benefits, the Nuzzis filed suit.

On review, the Fourth District upheld TRS and commanded the Nuzzis to repay the funds. Thomas and Deborah initially argued that Sections 16-149 and 16-149.2 were “ambiguous and inconsistent.” The court disagreed, finding both sections were clear and that their language was not “susceptible to more than one reasonable interpretation.” Also, any other reading would not serve the legislative purpose and might allow “members in plaintiffs’ position to earn an unfair premium the legislature did not contemplate.”

The court also rejected the Nuzzis’ argument that only Section 16-149 should have been applied. Again, the court found that it could not hold otherwise because “it would allow members to circumvent the legislature’s goal of

preventing unfair windfalls.”

Further, the court disagreed that the phrase “benefit is not payable” in Section 16-149(a) was ambiguous and inconsistent with other language in the Pension Code. Plaintiffs attempted to argue that, because the phrase differed, the legislature meant to impose different requirements. In response, the court stressed that “[o]nly one reasonable interpretation of these phrases exists - a member loses their right to continue receiving disability benefits if they work in any capacity as a teacher (except as provided in section 16-149.6).”

The *Nuzzi* case illustrates that recipients of pension benefits cannot “double dip.” In fact, as the *Nuzzi* court made clear, the TRS provisions are unambiguous: pensioners cannot both receive disability benefits and continue to work. Moreover, *Nuzzi* is important in that it demonstrates that there is no inconsistency between Sections 16-149 and 16-149.2. ■

New laws

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- shall, within 90 days of the effective date of this amendatory Act ...
- post to its website for the current calendar year
- a mechanism, such as a uniform single email address, for members of the public to electronically communicate with elected officials of that unit of local government or school district, unless such officials have an individual email address for that purpose.

This requirement would apply to pension boards *IF* the pension board maintains a website. The requirement *might* also apply if the pension board has a webpage on the unit of local government’s website.

* * *

With these new statutory changes, now is a good time for pension boards to review and update all of its rules and forms. If you have questions regarding the new laws or need assistance with updating board rules, please contact any of our pension attorneys. ■

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