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A Lot Has Happened Since Last We Were Together

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I. COVID-RELATED BENEFIT LEGISLATION

A. Public Safety Officer Benefits

On August 14, 2020, "Safeguarding America's First Responders Act of 2020" (the "Act") was signed into law. This law provides presumptive line-of-duty death and disability benefits to qualifying police officers and firefighters. For the purposes of death and disability benefits, this law creates a general presumption that a public safety officer who dies from COVID-19 or related complications sustains a personal injury in the line-of-duty.

Under the Act, a qualifying public safety officer who dies or who becomes permanently and totally disabled due to COVID-19 (or from complications thereof) in 2020-2021 is entitled to a presumptive benefit under the Public Safety Officer Benefits (PSOB) program. To qualify for

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federal benefits, a public safety officer must meet the following four criteria for line-of-duty death:

1. No competent medical evidence exists that the officer's death was directly and proximately caused by something other than COVID-19;

2. The public safety officer was engaged in a line-of-duty action or activity between January 1, 2020, and December 31, 2021;

3. The public safety officer received a diagnosis of COVID-19 (or evidence indicates that the officer had COVID-19) during the 45-day period beginning on his or her last day of duty; and

4. Evidence indicates that the public safety officer had COVID-19 (or complications therefrom) at the time of his or her death.

There is also a presumption for eligibility for line-of-duty disability related to COVID-19 or complications from COVID 19. To qualify for federal benefits, a public safety officer must meet the following two criteria for line-of-duty disability:

1. The public safety officer was engaged in a line-of-duty action or activity between January 1, 2020, and December 31, 2021; and

2. The public safety officer received a diagnosis of COVID-19 (or evidence indicates that the officer had COVID-19) during the 45-day period beginning on his or her last day of duty

B. Other State and Federal Actions

Florida House Bill 117 has been pre-filed creating a presumption of COVID 19. Like existing infectious disease presumptions, a vaccine is required. This will address the expiration of emergency orders.

The Occupational Health and Safety Administration (OSHA) has published guidance for determining job relatedness. Title 29, Section 1904.5, Code of Federal Regulations (29 CFR § 1904.5).

Texas adopted Senate Bill 22 which covers COVID infections contracted between March 13, 2020 and June 14, 2021. It also addresses health insurance claims. The presumption is rebuttable and the bill sunsets on September 1, 2023.

C. The Attorney General of Louisiana has opined that COVID-19 deaths may be treated as duty related but it will be a matter for the Board of Trustees of the retirement system to decide. AGO 20-0101(La. A.G. 9/30/20)

D. Virginia treats a COVID-19 death as presumptively job related from July 1, 2020 to December 31, 2021. Va. St. § 65.2-402.1

E. Indiana created a presumption in 2021 but the employee must provide an affidavit that he or she has not, outside of the scope of employment, been exposed to another individual with any variant of the disease. IN. ST. 5-10-13-5. The presumption is rebuttable by contrary evidence.

F. Arkansas had a presumption through March 31, 2021 by executive order.

G. Washington State Supreme Court held that it did not have authority to order the Governor to reduce prison population to diminish COVID threat to corrections officers. *Colvin v. Inslee*, 195 Wash.2d 879 (2020).

H. Is the decision to mandate vaccines a mandatory subject of collective bargaining? The Florida Public Employees Relations Commission declined to issue a declaratory statement on mandatory flu vaccines in the 2016 decision *In re Petition for Declaratory Statement of the Miami-Dade Public Health Trust*, 43 FPER 32 (Fla. PERC 2016). The Commission decided that the employer was looking to have past conduct declared lawful, a matter which PERC said should be resolved through the unfair labor practice process. The Florida Supreme Court has long held that mandatory drug testing is subject to collective bargaining for random tests but not for tests in time-sensitive

circumstances. *FOP v. City of Miami*, 609 So.2d 31 (Fla. 1992). Depending on the management rights clause of a particular collective bargaining agreement, the right of management to make reasonable safety rules may be seen as a waiver. Even if the right to order vaccines is reserved to management, impact bargaining may still be required. In recent weeks the Florida Public Employees Relations Commission has issued a notice of sufficiency is a failure to bargain charge concerning mandatory vaccination mandates.

I. A federal court in California ordered mandatory vaccinations for corrections personnel. Court held that bargaining the impact of the mandatory order was ongoing and should not prevent implementation. *Plata v. Newsom*, 2021 WL 4448953 (N.D. Cal. 9/27/2021)

J. Uneven guidance is found in private sector jurisprudence. A Washington state hospital challenged an arbitration award finding the employer lacked the ability to mandate flu shots. *Virginia Mason Hospital v. Washington State Nurses Ass'n*, 511 F.3d 908 (9th Cir. 2007); An injunction would not be granted to prohibit mandatory flu vaccination pending arbitration of issue, *United Steel Workers v. Essentia Health,* 280 F.Supp.3d 1161 (D. Minn. 2017); No Title VII violation for mandatory flu vaccine policy, *Robinson v. Children's Hospital Boston*, 2016 WL 1337255 (D.Mass 2016).

II. CONSTITUTIONAL ISSUES

A. Maryland Court of Appeals Upholds Reduction of Active Member Benefits But Affirms Judgment in Favor of Retirees

Ending 11 years of bitter litigation, the highest court in Maryland, the Court of Appeals, issued an 84-page decision in August upholding a trial court decision from Baltimore City concerning reductions made to both active member and retiree benefits in 2010.

In the Baltimore City Police and Fire Pension Plan, vesting occurs at the same time as a member becomes eligible for normal retirement - 20 years of service. This means that if a member leaves service before the completion of 20 years, all the member will receive is a return of employee contributions. Faced with a claimed fiscal emergency in 2010, the City changed normal retirement for police officers and firefighters from 20 to 25 years for anyone who had not completed 15 years of service as of the effective date of the law change. It also doubled employee contributions and changed the calculation of final average salary from the highest 18 months to the highest 36 months.

As to retirees, the City eliminated a gain-sharing cost-of-living adjustment (COLA) and substituted a fixed rate COLA of 1% beginning at age 60 and rising to 2% at age 65. The City does not participate in Social Security for public safety personnel. The gain-sharing benefit which was abolished provided an average of 2% per year beginning one year after retirement. The average Baltimore retiree, under the new formula, would go approximately 10 years with no cost-of-living adjustment. Disability retirees would go even longer.

In the Baltimore City Ordinance Code, there was a provision that stated that the pension was a contract which could not be diminished or impaired after a member began employment. Despite that, the City made the benefit reductions claiming a "reserved power" to modify the plan which was incorporated in the pension contract. The members and the employee unions filed suit in federal court. The trial court refused the member claim but found that retiree (including members eligible to retire) rights had been violated. The City and the unions appealed to the federal appeals court which determined there was a state court remedy and said it would not decide the federal claims when the state court was available. Proceedings then commenced in the state court and resulted in a ruling that the active members had no protected contract rights but that the retiree rights had been breached in the amount of $35M. On appeal, the Maryland Court of Appeals affirmed the trial court.

The long-term consequences are unknown. The City has tendered the judgment and it will shortly be distributed to retirees. The unanswered question is whether in the next fiscal crisis, will the City again reduce active member benefits?

***Cherry v. Mayor and City Council*, 2021 WL 3611768 (Md. August 16, 2021)**

B. Federal Appeals Court Grants Some Relief But Not Enough to Save the U.S. Virgin Islands Fund

The Government Employees Retirement System of the U.S. Virgin Islands (GERS) has provided retirement benefits to territorial officers and employees since the late 1950s. Almost since its inception, the Government (GVI) has failed to properly fund the system. In 1981, the Board of Trustees sued the GVI in federal court and they entered into a consent decree to provide for timely contributions. When the GVI failed to keep up with payments, a second action was brought and an amended decree was entered into in 1994. On several occasions after that, the Board sought judicial enforcement of the GVI's contribution responsibility but the courts refused to entertain the claims on the basis that no one was in danger of missing a payment. In 2016, the actuaries for GERS warned that without a major cash infusion, the Fund would exhaust its assets in 2023. Again, GERS brought an action and this time the federal court heard the matter. The court awarded $60 million in additional contributions but decided that the actuarially-required contribution was not covered by the consent decree. A federal appeals court upheld the $60M order but by a 2-1 vote affirmed that the decree did not encompass the remaining contributions. A suit has been filed in the territorial court (which did not exist when the consent decree was created) seeking enforcement of the remaining contributions. In the meantime, the race to insolvency and a loss of 25% of the territory's GDP looms.

***GERS v. Government of the Virgin Islands*, 995 F.3d 66 (3d. Cir. 2021)**

C. Alaska Supreme Court Prohibits Dual Credit

Two Anchorage police officers retired and began drawing retirement benefits. Thereafter, they filed suit against their former employer claiming a racially hostile work environment led them to retire. They prevailed in their litigation against the Municipality of Anchorage, but the claimed damages awarded were for a period after they retired and began drawing benefits. The retired officers made a claim to the Board of Trustees of the retirement system for additional service credit. The Board responded that the plan prohibited accrual of credited service while also in receipt of a benefit. The Board offered to allow the officers to rescind their retirement, return the benefits received, and be credited with service claimed. The officers refused and sued the Fund. A trial court ruled for the System and the officers appealed to the Alaska Supreme Court. The Court ruled that the plain language of the ordinance prohibiting in-service distributions and accrual of credited service while receiving a retirement benefit was correctly applied by the Board and the denial of the benefits was affirmed.

***Kennedy v. Anchorage Police and Fire Retirement System,* 485 P.3d 1030 (Alaska 2021)**

D. Change in DROP Distribution Method Does Not Impair Contract

A statute governing the Dallas Police and Fire Pension Fund was amended to change the method of withdrawal of deferred retirement option plan (DROP) account balances. Previously, retired officers could draw the balance upon demand until the mandatory distribution age under the federal tax code. To prevent excess cash flow demands upon the fund, the withdrawal method was changed from cash on demand to an annuity with substantially equal payments for life. Retirees sued in federal court claiming this change in distribution impaired their constitutional rights under the Texas Constitution's pension clause, Article XVI, Section 66. A federal appeals court referred the matter to the Texas Supreme Court to determine the extent

of the pension contract under state law. A divided state supreme court answered the certified question that the method of distribution (annuity vs. cash) was not a protected constitutional right. The court noted that no member's DROP account had been reduced nor monthly retirement benefit lowered. As such, the prospective reform was deemed constitutional.

***Degan v. Board of Trustees*, 594 S.W. 3d 309 (Tex. 2020)**

E. Benefit Spiking is not a Constitutional Right

In an effort to prevent pension spiking, the City adopted an administrative regulation that capped the amount of accumulated leave that could be used in the calculation of final average compensation, to the amount accrued on the date the regulation was adopted. The union and employees challenged the regulation on the basis that it violated Arizona's constitutional pensions clause and the federal constitution prohibition against impairment of contract. A trial court upheld the regulation on the basis that leave payouts are not made annually and therefore were not wages and salary. An appeal court affirmed the trial court. On further review, the supreme court affirmed the regulation. It noted that the practice of including one-time leave cash-outs as pensionable compensation was just that, a practice. The court held that the terms of the plan were set forth in the city charter and those terms constituted the members' pension contract. The court upheld the interpretation that wages and salary meant fixed amounts paid at regular, periodic intervals. The fact that one-time cash-outs had been included for a period of years did not alter their nature nor could a prior practice be deemed a contract. As the administrative regulation was prospective in its application, the court found that no vested rights had been disturbed and upheld the anti-spiking regulation.

***AFSCME v. City of Phoenix*, 249 Ariz. 105, 466 P.3d 1158(2020)**

F. California Supreme Court Approves Law Eliminating Spiking but Preserves "California Rule"

In a long-awaited decision on a 2013 reform bill aimed at benefit spiking, a unanimous California Supreme Court upheld the constitutionality of the legislation. While a wholesale re-writing of the long-standing "California Rule" which prevented past employment reduction of benefits with a comparable offset was urged, the Supreme Court took a more measured approach.

Perhaps the most important sentence for analytical purposes provides as follows:

> The State, at least implicitly, and amicus curiae California Business Roundtable, explicitly, urge us to use this decision as an occasion to reexamine and revise the California Rule, arguing that the rule constitutes an improper interpretation of the contract clause and bad public policy. Because we conclude that PEPRA's amendment of CERL did not violate the contract clause under a *proper application* of the California Rule, however, we have no jurisprudential reason to undertake a *fundamental reexamination* of the rule. The test announced in *Allen*, as explained and applied here, remains the law of California. (emphasis added)

***Alameda County Deputy Sheriffs' Ass'n v. Alameda County Employees Retirement Ass'n,* 9 Cal. 5th 1032 (2020)**

III. RULE MAKING

A. Anti-Spiking Policy Requires Rule Making

A dispute arose between the state treasurer as trustee of the retirement system and the county school board over pension funding. To prevent

spiking the legislature adopted a benefit cap employing a contribution-based benefit cap and retirement system employed an actuary to make the required calculations. The pension fund adopted the benefit cap formula by resolution instead of going through rule making under the state Administrative Procedures Act. A trial court invalidated the resolution and that decision was affirmed by the court of appeals. On review in the North Carolina Supreme Court, the earlier decisions were upheld. The court found that nothing in the statute indicated an exemption from the requirement of public rule making and that requiring that process assured adequate public notice prior to the adoption of the cap. Because the benefit cap was not a ministerial decision, it must be adopted through formal rule making.

***Cabarrus County Board of Education v. Dept. of State Treasurer,* 374 N.C. 3, 839 S.E.2d 814 (2020)**

IV. COST-OF-LIVING ADJUSTMENTS

A. Impairment of Contract/COLA

In 2012, Providence enacted an ordinance suspending COLAs to retirees until the pension fund was 70% funded. Litigation followed and a consent decree was entered allowing a 10-year suspension. A number of plan members opted out of the settlement and pursued their own claims for breach of contract and impairment of contract. The opt-out plaintiffs lost a bench trial and appealed to the Rhode Island Supreme Court. The Supreme Court held that the plaintiffs had established beyond reasonable doubt that they had a contractual right to their pension benefits, including the COLA. The Supreme Court found that the city had failed to prove its actions were reasonable and necessary because the ordinance suspending them had no definite end point and could not be deemed temporary. The actuarial evidence showed that more than half of the plaintiffs would die before the suspension was lifted. The Supreme Court remanded the case back to the trial court to determine a reasonable period of suspension. The

Supreme Court affirmed the trial court findings in favor of the City on the grounds of taking without due process and equitable estoppel.

***Andrews v. Lombardi*, 231 A.3d 1108 (R.I. 2020)**

B. COLA - Consent Decree Cannot Be Set Aside by Ordinance

In a related case to Andrews, retirees sued arguing that to the extent the City adopted a suspension of COLA ordinance, it violated the terms of a 2004 consent decree. A trial court dismissed the action. On appeal, the state supreme court overruled the trial court finding that once a court had approved the consent decree, the City lost the ability to modify its terms except by judicial action. Attempting to invalidate the decree by ordinance violated the separation of powers doctrine in the state constitution.

***Quatrucci v. Lombardi*, 232 A.3d. 1062 (R.I. 2020)**

C. COLA Dispute is Not The Board's Responsibility

The retirement board voted to suspend COLAs for three years beginning in 2018. A legislative amendment that year allowed for COLAs but only after a period of time as determined by the board. The retirees sued claiming that the statute gave unconstitutional law making authority to the board and that the board and its actuaries procured the amendment by fraud. A trial court granted motions to dismiss. On appeal, the court affirmed the trial court decision. The appeals court found that any dispute over the statute was between the legislature and the retirees. Since the board, and not the legislature, was sued there was no dispute between the board and the retirees to be litigated. The fraud allegation was not raised in the appeal and was abandoned. Lastly, the claim that freezing the COLA was a constitutional violation was not reached by the court because it was able to resolve the case without reaching the level of a constitutional analysis.

***Ohio Association of Public School Employees v. School Employees Retirement System*, 2020 Ohio 3005, 2020 WL 2537669**

V. SOVEREIGN IMMUNITY

A. Waiver of Sovereign Immunity Strictly Construed

A group of retired Miami city police officers sued the pension board alleging that fund staff failed to properly advise them on whether they should retire/enter DROP in a time of fiscal emergency facing the employer. The retirees claimed negligence and breach of contract. The plaintiffs failed to give written notice under the state waiver of sovereign immunity law on a timely basis and all negligence counts were dismissed based on statute of limitations. The board moved to dismiss the contract count arguing that nothing in the pension ordinance created an express contractual obligation on the pension board to counsel members on when to retire. Because any contract was implied, the board argued it enjoyed sovereign immunity. A trial court denied the motion and the board appealed. The appeals court reversed. It found that while sovereign immunity was waived for express contract, the state had never waived sovereign immunity for implied contracts and the appeals court ordered the case dismissed. A companion case against the City's general employee retirement plan by their retirees was also dismissed for sovereign immunity.

***City of Miami Firefighters and Police Officers Retirement Trust v. Castro*, 279 So.3d 803 (Fla. 3d DCA 2019)**

VI. FIDUCIARY DUTY/STANDING TO SUE

A. A group of active and retired members of the state retirement plan sued various trustees, staff members, outside advisors, and investment managers for breach of fiduciary duty. The underlying allegation was that the investment of fund assets in hedge funds led to losses and payment of excessive fees. Ultimately, the Kentucky Supreme Court ordered the dismissal of the case. The court noted that KRS is a defined benefit plan and, as such, the state was obligated to make the retirement benefit payments even if the retirement system became

insolvent. As a result, a plan participant lacks standing to sue as long as promised benefits are being paid. This is consistent with a recent ERISA case decided by the U.S. Supreme Court in *Thole v. U.S. Bank*, 140 S. Ct. 1615 (2020). In *Thole*, the U.S. Supreme Court found that where the beneficiary of a DB plan had received all of the promised payments, that participant lacked standing (a legal injury sufficient to enable a person to bring suit) to bring an action under ERISA. This is consistent with the U.S. Supreme Court's earlier decision in *Hughes Aircraft Co. v. Jacobson*, 119 S.Ct. 155 (1999). In *Hughes,* a group of employees of a company acquired by Hughes Aircraft made claim to excess assets in their former employer's retirement plan. In unanimously rejecting the claim, the U.S. Supreme Court noted that when a DB plan is underfunded, it is the employer who must guarantee the shortfall. By the same token, since the employer takes the funding risk, it is entitled to the credit for any surplus funding. If a plan is overfunded, participants get no greater benefit than that set forth in the plan document. If the plan is underfunded, the employer must assure that sufficient contributions are made to provide the defined benefit payments in full, as and when they occur.

***Overstreet v. Mayberry,* 603 S.W.3d 244 (Ky 2020)**

B. Investment Authority/Standing to Sue

In a related case to *Overstreet,* a group of cities that participated in County Employees Retirement System, a component part of the Kentucky Retirement Systems, filed suit challenging the investment of CERS assets in hedge funds. The Board of Trustees had unsuccessfully asserted the defense of sovereign immunity but prevailed on the merits. A trial court held that since the investments were authorized by law, the board did not violate its fiduciary duty by investing. The Kentucky Court of Appeals affirmed, no statutory violation occurred.

***City of Fort Wright v. Board of Trustees*, 2020 WL 116009 (Ky. App. 2020)**

VII. SERVICE RETIREMENT

A. An Irrevocable Decision Means Just What it Says

A PERS member was approaching retirement eligibility having completed 30 years of service. Under the terms of the plan, at 30 years a member has the option to make an irrevocable decision to continue in the plan, in which case future earnings would count towards final average compensation. Alternatively, a member could elect to receive post-30 year contributions as a cash payment upon separation, but the final average compensation would be based solely on wages earned in the first 30 years. The employee learned of a pending retirement that he believed could be used to raise his final average salary. Ultimately, he learned that his irrevocable election to accept the contribution return prevented any recalculation of his retirement. The employee filed suit claiming he received advice from a retirement system employee leading him to believe his benefit could be recalculated. That claimed advice, however, occurred after the irrevocable election had been made. Ultimately, the court decided that issue was a question of law and any statements from an employee were irrelevant. The employee also claimed his constitutional contract rights were violated. Again rejecting the employee's claim, the appeals court held that the statute and the employee's irrevocable election to accept a contribution return in lieu of the right to revalue his retirement benefit determined his rights and no contract violation nor impairment of contract occurred.

***Sloma v. Washington State Department of Retirement Systems*, 12 Wash. App. 2d 602, 459 P 3d. 396 (2020)**

B. Re-Employment Rules May Be Strictly Enforced

A school teacher from Elizabeth, N.J. was terminated due to a reduction in force. Approximately 10 months later, the former teacher was employed by a staffing company as a substitute teacher and assigned to schools in her former school district. Approximately one

month after beginning service as a contract employee, the teacher applied for and began receiving pension benefits. Under the terms of the plan, if a member returns to employment, even as a contract employee, within 180 days of retirement, the member's benefit is suspended, the member is re-enrolled as an active participant, and the member must repay any pension benefits received. The following year, the member became a full-time teacher again. She informed the retirement plan of her re-employment and the plan suspended her benefit and demanded repayment of $32,000 of the pension paid to date. The employee challenged the suspension arguing that her employment as a contractor did not constitute employment covered by the plan. She argued further that the contractor had given her assurances to that effect. The court rejected both arguments, relying on the plain language of the statute. The court also noted that assurances from third parties not related to the retirement plan cannot create an estoppel.

***Schwartz v. Department of Treasury*, 2020 WL 4006621 (N.J. Super. 2020)**

VIII. DEATH BENEFITS

A. Beneficiaries Have the Right to Elect an Option

A New Jersey teacher with 24 years of service was diagnosed with cancer. On the advice of his union, he elected early retirement which would commence at his 25th year. Unfortunately, his cancer progressed rapidly and he died with 24 years and 9 months of service. Because he was short of 25 years, his survivors qualified only for a return of contributions and a group life benefit. Had he applied for ordinary disability retirement, his widow and children would have qualified for a larger benefit. The surviving spouse requested an opportunity to elect disability retirement but the fund stated that such changes were not permitted. Ultimately, the case reached the New Jersey Supreme Court which reversed and ruled for the surviving spouse. The court

unanimously held that beneficiaries have the same right of a deceased member to amend an application before the benefit becomes payable. Since the member had not reached 25 years at the time of his death, and the application to modify was made expeditiously and in good faith, it was an abuse of discretion to deny the modification.

***Minsavage for Minsavage v. Board of Trustees*, 240 N.J. 103, 220 A.3d 465 (2019)**

B. Divorce Does Not Extinguish Survivor Benefit

Jodi Shulga divorced firefighter Ronald Shulga. Ronald remarried Mary Shulga, and upon his untimely death 9 months after his marriage, Mary received the widow's benefit in its entirety. Jodi had been awarded half of his firefighter benefit in the divorce and sued to obtain half of the survivorship benefit. The court found that Ronald Shulga had entered into an agreement with Jodi in the divorce and the court determined that the contract should be honored. The court required that one half of the death benefit be held in trust for the former wife.

***In re Marriage of Shulga*, 2019 IL App. 182028 (2019**

IX. DISABILITY

A. Workers' Compensation Decides Cancer Presumption

A Cranston, Rhode Island firefighter was diagnosed with colon cancer and disabled as a result. The issue was whether the Workers' Compensation Court had authority to decide the question of eligibility for retirement. Secondly, the question presented was whether the cancer provision was intended to create a presumption of job relatedness. Because of the unresolved issues, the state supreme court agreed to consider the matter. The court found that because the cancer law was contained within the workers' compensation statute, the Commission had jurisdiction to hear the matter. The court found,

however, that nothing in the cancer act created either a rebuttable or conclusive presumption of job relatedness. This left it to firefighter disability applicants to prove the date or origin and the cause of the cancer. The supreme court returned the matter to the Commission to decide entitlement to disability based on proof presented by the applicant.

***Lang v. Municipal Employees Retirement System*, 222 A.3d 912 (R.I. 2019)**

B. Substantial Evidence Supports Cancer Benefits

A firefighter was diagnosed with colon cancer. Following treatment, he went into remission and returned to duty. The cancer returned 2 years later and ultimately claimed the employee. The Board granted disability/death benefits to the surviving spouse finding there was no genetic predisposition to the cancer and determined that the cancer was job incurred. The village contested the award. The court credited the experience of the firefighter trustees and their ability to determine that an experienced firefighter with more than 125 fire calls would likely be exposed to substantial carcinogens. As such, the court ultimately deferred to the board's findings and sustained the award of benefits.

***Village of Buffalo Grove v. Board of Trustees*, 2020 IL App. 2d 19071, 141 N.E. 3d1200 (2020)**

C. Repetitive Injury Can be Source of Disability

A cafeteria worker applied for disability retirement based on multiple health issues arising from the repetitive nature of her job. Under the terms of the plan, the applicant needed to show that her particular employment led to her disability as opposed to more general complaints such as job stress. In ultimately ruling for the employee, the Hawai'i Supreme Court held that repetitive injuries can qualify if they are unique to her job. While this did not mean that only certain jobs can qualify for disability, this particular job met the test.

***Quel v.Board of Trustees*, 146 Hawai'i 197, 457 P. 3d 836 (2020)**

D. Supervisory Role Determines Existence of Disability

An assistant police chief made application for accidental disability benefits as a result of a work-related motor vehicle accident. The application was denied for failure to establish that he was permanently incapacitated from performing his job duties. The evidence showed that the chief recovered from the auto accident after two weeks and remained on the force with no job restrictions until taking a service retirement four years later. After retiring in 2009, he applied for the disability retirement, claiming his service retirement was precipitated by the injuries suffered in 2005. On judicial review, the denial was affirmed as the injuries did not prevent the chief from performing the supervisory nature of his job. Coupled with that was a lack of evidence showing any physical law enforcement work in the year prior to his retirement and the fact that post-retirement he was working as an investigator.

***McGowan v. DiNapoli*, 178 A.D. 1243, 116 N.Y.S.3d (2020)**

E. Memory Loss is an Injury

A Baltimore City police officer suffered a duty-related concussion resulting in a traumatic brain injury. As a result, the officer suffered memory loss and attention deficit. Under the terms of the plan an ordinary disability may be granted for physical or mental injury. A line-of-duty disability, which is a much higher benefit, is awarded only for physical injury. A hearing officer determined that the effects of the concussion were physical and awarded a line-of-duty disability. On appeal, a trial court upheld the decision but on further appeal, a mid-level appeals court reversed, finding the disability was mental. The state's high court accepted discretionary review and reinstated the line-of-duty disability. The court found that the evidence established that the officer's incapacities were physical in origin and therefore were encompassed within the plan definition of line-of-duty injury.

***Couret-Rios v. Fire & Police Employees Retirement System*, 468 Md. 508, 227 A. 3d 637 (2020)**

F. Social Security Disability Award Does Not Bind Board

A senior enforcement officer for the Mississippi Department of Transportation sought treatment for a variety of pain-related and orthopedic issues. She claimed that pain prevented her from performing her job which involved considerable physical activity and applied for disability retirement. While the examining doctors differed in their opinions, a functional capacity examination revealed that the employee's behavior was self-limiting and self-restricting. During the examination, she exhibited none of the physical responses expected had she been providing a genuine effort during the examination. She resigned the following year after allegedly injuring her left trigger finger in a firearms proficiency exercise. The finger apparently healed but the employee contended the pain was debilitating. The PERS medical board and the pension board rejected the claim. The employee appealed and the trial court affirmed the denial. On appeal to the state supreme court, the employee argued that her subsequent award of Social Security disability benefits was binding on the PERS board. She also argued that the PERS board's decision was not supported by the evidence. The Supreme Court upheld the denial finding that none of the treating physicians awarded any permanent disability rating. In addition, the court observed that findings by the Social Security Administration are not binding on PERS as they are under different statutory regimes.

***Stakelum v. Public Employees Retirement System*, ___So. 3d___, 2019 WL 5884574 (Miss. 2019); accord, *Thompson v. Public Employees Retirement System*, ___So. 3d ___, 2019 WL 6125163 (Miss. 2019)**

G. Board May Choose Among Competing Expert Opinions

A correctional officer witnessed a violent incident while at work. She applied for service-connected disability retirement based on PTSD suffered as a result of the incident. A hearing examiner recommended that the application be granted. Following a formal hearing, the board

determined that the employee did not meet the standard for disability as defined in the plan. On a petition for review to a trial court, the board's decision was upheld and the member sought review in the appeals court. In reviewing the evidence, the court noted sharp disagreement between the examining doctors, with each criticizing the methodology of the other. Ultimately determining that case was a "battle of the experts," the court concluded it was within the board's authority to determine which expert it found most convincing. Noting that the only issue on review was whether the board's decision was supported by substantial evidence, the court concluded that it was not the court's job to substitute its view of the facts for that of the board and upheld the denial of the disability application.

***Haynes v. Disability Review Board*, 2020 WL 4218333 (Md. App. 2020)**

H. Exposure to Reports of Violent Crime Does Not Warrant Disability

A court reporter claimed permanent mental disability benefits caused by the vicarious trauma she experienced through exposure to details of violent crimes during her employment. The Contributory Retirement Appeal Board denied her claim. On appeal, the court focused on whether the disability arose from an identifiable condition which was not common or necessary to all or a great many jobs. The court noted that exposure to the details of violent crimes was common to a broad spectrum of jobs in the judicial branch, medicine and law enforcement. The board also considered evidence relating to the applicant's alcohol dependency and marital issues. The court concluded that the evidence relied upon was sufficient to support the decision a reasonable mind could make to support the board's conclusion and it was not appropriate for the court to substitute itself for the board.

***Morse v. Contributory Retirement Appeal Board*, 96 Mass.App.Ct. 1114 (2019)**

I. PTSD Disability Granted Despite Lack of Treatment

A Mesa, Arizona police officer applied for disability retirement claiming PTSD and major depressive disorder arising from an internal affairs investigation. At the hearing, the officer claimed his disability arose from an incident ramming a suspect's car, but the record showed that the officer had sought no treatment and denied the benefit on appeal, however, the court reversed the board's decision, finding that the board had ignored the weight of the evidence.

***Pascarella v. Mesa Police Pension Board*, 2020 WL 207069 (Ariz. App. 2020) Compare, *Severns v. Board of Trustees*, 2020 WL 1933147 (N.J. Super 2020)**, police officer confronted with armed suspect did not meet standard for disability based on PTSD because such events are an expected risk of the job.

J. Incorrect Payment Renews Statute of Limitation

A retired employee brought an action under California's Fair Employment and Housing Act based on the claim that the retirement plan paid reduced benefits to employees who took disability retirement after less than 22.22 years working for the City of San Francisco. A trial court dismissed the complaint for failure to file a claim within one year of the date the reduced disability benefit was granted. Without reaching the merits of the case, the appeals court held that each time a payment was made, the unlawful act was repeated on the basis of a continuing violation. The court also rejected a claim of sovereign immunity stating that the claim was not about the passage or non-passage of a discriminatory provision, it was about the enforcement of an allegedly discriminatory practice. The dismissal ruling was reversed and the matter was returned to the trial court for proceedings on the merits of the claim.

***Carol v. City and County of San Francisco*, 41 Cal. App. 5th 805 (2019)**

K. Union Permitted to Advance Disability Claims for Deceased Officers

Two Maryland police officers applied for disability retirement. Prior to their cases being considered they died. Survivorship benefits for a disabled officer were higher than the ordinary death benefit which consisted of a return of employee contributions and a life insurance payment. Their union pursued the applications on their behalf. Ultimately it was determined by the court that the processing of the disability applications was ministerial in nature. Whether disability was appropriate would be determined by the evidence but the fund erred in not processing the applications, even after the death of the officers.

***Fraternal Order of Police Lodge 35 v. Montgomery County*, 2020 WL 974223 (Md. Sp. App. 2020)**

L. Resignation Terminates Disability Process

A judiciary employee posted disparaging remarks about his employer on social media. While disciplinary proceedings were pending, the employee applied for disability retirement. Ultimately, the disciplinary case was settled and the employee voluntarily resigned. Following the resignation, the board cancelled the disability application as the participant was no longer a member of the plan. Upon judicial review, the court found that the language of the statute was clear that resignation terminated the disability process and the board's decision was upheld.

***M.R. v. Board of Trustees*, 2020 WL 167322 (N.J. Super 2020)**

X. FORFEITURE OF BENEFITS

A. Deception of Disabled Status Warranted Forfeiture

A former firefighter was charged with theft by deception for lying to doctors on his disability application. The firefighter claimed to have

suffered back injuries in two on-the-job incidents. His application for service-connected disability was denied but he was awarded an ordinary disability. The member requested a formal administrative hearing to appeal. During the course of the investigation preceding the formal hearing it was discovered that the firefighter was teaching martial arts and had competed in a martial arts contest. Video proof of these events was established. The board referred the matter to the state attorney general and criminal charges were brought against the firefighter. He was convicted by a jury and sentenced to seven years in prison and ordered to refund $80,000 in benefits received. On appeal the conviction was upheld based on what the court called ample proof of his crime and also found that the board's referral of the matter for investigation did not result in a miscarriage of justice.

***State v. Streeter*, 2020 WL 3527154 (N.J. Super).**

B. Racial Epithets on the Job Warrants Forfeiture

A New Jersey school teacher used racial epithets against fellow employees on several occasions. The school board determined that the comments were intentional and made in anger. Disciplinary proceedings ensued but were ultimately settled. The settlement, however, specifically excluded any agreement on how the retirement board would address the misconduct in the context of a forfeiture. The retirement board conducted a hearing and examined the statutory factors which could lead to a partial or total forfeiture of benefits. Ultimately, the board settled on a 10% reduction in the retirement benefit which amounted to approximately $260 per month. A reviewing administrative law judge found the penalty was not warranted and that the employee's service had been honorable taken as a whole. The board rejected the administrative law judge's recommendation based not only on the actual incidents, but the employee's untruthfulness in the ensuing investigation. On judicial review, the court found that the board's analysis was consistent with the governing law and that the penalty was commensurate with the offense. As a result, the court determined that deference to the board was appropriate and upheld the partial forfeiture.

***Cook v. Board of Trustees*, 2020 WL 1866935 (N.J. Super 2020)**

C. California Appeals Court Upholds Constitutionality of Forfeiture Laws as a Civil Penalty

In a pair of cases, two California appellate courts have upheld the validity of a forfeiture provision based on conviction for certain crimes added to California law in a major 2013 pension reform act. The courts rejected the claim that the law was an impermissible penalty or that it was an *ex post facto* punishment. Reduced to its essence, the courts adopted a long line of cases from other states (notably Florida, Oklahoma and New Jersey) which considered completion of public service under honorable circumstances as an inherent element of the pension contract. Employees who committed specified felonies had breached their obligations under the pension contract and the loss of benefits was a constitutional result. The jurisprudence in this area is new and the required level of due process has yet to be developed.

***Wilmot v. Contra Costa County ERA*, 275 Cal. Rptr.3d 52 (Cal. App. 2021)**

***Hipsher v. Los Angeles County ERA*, 272 Cal. Rptr.3d 664 (Cal. App. 2020)**

XI. RETIREE HEALTH CARE ISSUES

A. A Look Back

1. Retiree Health Care has Received Considerably Different Protection Than Pensions.

2. A Stark Comparison.

   In ***Duncan v. Retired Public Employees of Alaska***, 71 P. 3d 882 (2003) retiree health insurance benefits were found to be covered by the state constitutional pensions clause.

   But in ***Studier v. Michigan Public School Employees Retirement Board,*** 698 N.W.2d 350 (Mich. 2005), the Supreme

Court of Michigan held that retiree health care benefits were not "accrued financial benefits" protected under the state constitution's pension clause.

B. What Have the Federal Courts Said?

1. Private Sector Retiree Health Care Is Not Guaranteed.

In ***M & G Polymers v. Tackett***, 136 S.Ct. 926 (2015) the U.S. Supreme Court rejected the idea of federal common law guaranteeing contribution-free retiree health care absent an express provision in a collective bargaining agreement establishing the right. Otherwise, employers remain free to alter the program.

2. Public Employee Plans Turn on Both Contract and Constitutional Grounds.

In ***Donohue v. Cuomo***, ___F3d___, 2020 WL 6533252 (2d Cir. 11/6/2020) the largest civil service employees union sued over the state reduction in its contribution rate to retiree health insurance premiums for the first time in 29 years. The union claimed that under prior collective bargaining agreements, the retirees were entitled to a fixed percentage contribution and the changes constituted breach of contract and impairment of contract in violation of the U.S. Constitution. A series of trial courts ruled against the retirees. On appeal, the federal appeals court found that the plaintiffs had made out a case to find that the impairment was substantial and unexpected. The question then is whether the impairment was reasonable and necessary. If it was breach of contract, however, the question is whether the former CBAs vested rights in the retirees. Rather than decide the merits, however, the federal court certified two questions to New York's highest court, the Court of Appeals. The questions ask the New York Court to decide (1) whether under New York law a CBA vests insurance rights without an express specification that rights extend beyond the life of the CBA and (2) whether New York has the statutory authority to negate the vested right precluding a breach of contract claim.

The appeals court cited to *M & G Polymers* in formulating its questions. It also expressed the view that common law breach of contract claims will permit a court to avoid deciding a case on constitutional grounds.

3. State Courts Have Not Favored Retiree Rights.

In ***City of Waycross v. Bennett***, ___S.E.2d___, 2020 WL 5554167 (Ga. App. 9/17/2020) retired city employees sued after termination of health care benefits in effect on the day of retirement. While holding that vested pension benefits are protected against impairment, the absence of a vesting provision for health care enabled unilateral changes by the employer.

Even though the labor agreement contained a lifetime insurance benefit, the Rhode Island Supreme Court in ***Hebert v. City of Woonsocket***, 213 A.3d 1065 (R.I. 2019) found that the state Fiscal Stability Act empowered the City to act unilaterally to alter those rights.

C. What Distinguishes the Cases That Succeed and Those That Don't?

1. If the insurance is part of the retirement program, the benefit is more likely to be seen as a vested pension right.

2. State breach of contract claims have a higher rate of success than constitutional claims. Courts are generally reluctant to resolve cases on constitutional grounds. And, if a state court breach of contract remedy exists, federal courts will customarily refrain from taking jurisdiction and will send the case to state court.

3. If the benefit is created in a collective bargaining agreement, it is unlikely to confer retiree rights beyond the term of the agreement unless there is an express provision extending the retiree health care provisions - even then financially distressed employers may be able to avoid the contract. That result, has itself been uneven. Compare, ***Hebert v. City of Woonsocket*** (above) and

Headley v. City of Miami, 215 So.3d 1 (Fla. 2017) (constitutional right to collective bargaining took precedence over state financial urgency law)

XII. CONCLUSION

IF YOU HAVE ANY QUESTIONS OR COMMENTS CONCERNING THIS PRESENTATION, CONTACT ROBERT D. KLAUSNER, ESQUIRE, KLAUSNER, KAUFMAN, JENSEN & LEVINSON, 7080 N. W. 4TH STREET, PLANTATION, FLORIDA 33317, (954) 916-1202, FAX (954) 916-1232, E-MAIL bob@robertdklausner.com. Visit our website www.robertdklausner.com.

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