

PENSION POINTERS



Frequently Asked Questions About Employer Intervention in Disability Matters

By John E. Motylinski
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Municipalities and fire protection districts seeking to intervene in disability proceedings has become commonplace. Spurred in part by Illinois Supreme Court rulings, employers seek to defend their interests in workers' compensation and Public Safety Employee Benefits Act (PSEBA) claims by intervening in the related disability matter. Yet, the law governing intervention has been slow to catch up, leading to conflicts. Below are answers to frequently asked questions about intervention by a city, village or fire protection district in a disability proceeding before a pension fund.

Q: Does a municipality have an absolute right to intervene in a disability hearing?

No. Municipalities do not have an absolute right to intervene in a disability pension hearing. (*Village of Stickney v. Board of Trustees of the Police Pension Fund of the Village of Stickney*, 347 Ill. App. 3d 845 (1st Dist. 2004))

A pension board, however, has the discretion to allow such intervention, provided that its decision is not arbitrary or capricious. This discretion stems from the Board's fiduciary duty owed its participants and beneficiaries to properly screen disability claims (40 ILCS 5/1-109).

Q: Can a municipality intervene in any disability hearing?

No. Municipalities can only intervene when their interests are impacted. These interests may include a generalized desire to ensure that pension funds are properly

expended, the potential award of health benefits under PSEBA, possible impact on pending workers' compensation cases, and in some cases, the development of a full evidentiary record.

Q: What has been the main reason municipalities seek to intervene in disability matters?

PSEBA is one of the main reasons why municipalities intervene in disability matters.

When a public safety employee suffers a "catastrophic injury" in emergency situations, PSEBA requires the employer to pay "the entire premium of the employer's health insurance plan for the injured employee, the injured employee's spouse, and for each dependent child of the injured employee until the child reaches the age of majority." (820 ILCS 320/10) These costs can be significant.

A "catastrophic injury" under PSEBA is synonymous with an injury giving rise to a line-of-duty disability pension. (*Krohe v. City of Bloomington*, 204 Ill. 2d 392, 400 (2003)). Illinois courts have further held that if a municipality wishes to contest whether the applicant has experienced a "catastrophic injury," it must do so in front of the pension fund during the disability proceedings. (*Village of Vernon Hills v. Heelan*, 2015 IL 118170). That means that if a municipality does not intervene in the pension board proceeding, it will never have another chance to dispute whether the applicant suffered a catastrophic injury.

Thus, municipalities often seek to intervene to make sure they can "have their

say" on whether an applicant has suffered a line-of-duty—or "catastrophic"—injury. Furthermore, some municipalities use the petition to intervene as leverage to obtain a concession from the employee to "waive" any entitlement to PSEBA benefits. In these instances, the municipality will agree to withdraw its petition to intervene if the employee agrees to waive PSEBA benefits.

Q: How can a pension fund's decision on a disability application impact a workers' compensation case?

Both workers' compensation cases and pension fund disability proceedings seek to answer essentially the same question: whether the employee's injury was work-related. If one administrative agency resolves that issue before the other, the outcome is sometimes imputed to the remaining proceeding. In legalese, this concept is called "collateral estoppel."

For collateral estoppel to apply: (1) the issue decided in the prior adjudication must be identical with the one presented in another matter; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. (*Village of Alsip v. Portincaso and Board of Trustees of the Alsip Police Pension Fund*, 2017 IL App (1st) 153167).

Applied in this context, collateral estoppel can mean that if a pension

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AN IMPORTANT MESSAGE FOR YOUR FIRE DISTRICT PRESIDENT REGARDING THE ILLINOIS FIRE PENSION INVESTMENT FUND

IAFPD respectfully urges your Fire Protection District Board President to cast their ballot for the only 2 fire protection district candidates: John Perry and Dave Geary.



On October 26th, election ballots will be mailed to board presidents. For your vote to count, you must return your ballot by US Mail as soon as possible so it is received by December 1, 2020. The Northern Alliance of Fire Districts and the Illinois Alliance of Fire Protection Districts ask that you support Fire Protection Districts by casting your vote for **John Perry** (Lisle-Woodridge FPD) and **Dave Geary** (Wauconda FPD).

The consolidated board was created by the Legislature to consolidate all 'suburban and downstate' fire fighter pension funds. Of the 296 pension funds, only 109 represent fire districts and 187 are from municipalities.

Only mayors of municipalities and presidents of fire protection districts that have Participating Pension Funds are eligible to vote for these Executive Trustees. Fire Protection Districts need to vote for the 2 FPD board members. Due to the sheer number of municipalities represented, we will not get a seat if your ballot is not cast.

John Perry and Dave Geary are nominated under the two Executive Trustee positions on the ballot. Their experience and knowledge compares favorably with any candidate. John and Dave will work to find ways to eliminate unnecessary administrative costs and increase investment returns to fund future pension benefits within our limited tax resources.

Reasons to vote for Fire District representatives:

- Candidates are highly qualified with broad experience in managing Fire Districts and local government.
- Both have extensive experience with Fire and Police Pension Funds
- Fire Districts have unique considerations (particularly tax limitations and property tax reliance). This perspective needs to be represented on the Board to build a management plan that is effective.
- This diversity of experience and viewpoint needs to be blended

with the needs of organizations represented by other Board members to assure effective collaboration.

- These candidates will work to reduce unnecessary administrative costs and maximize investment earnings to preserve funds for paying pensions.
- Local boards must be supported to reduce costs for fiduciary insurance, actuarial analyses, audit and accounting, and legal.
- Local boards need to be regularly informed of the requirements and effectiveness of the FPIF.

For more information on the process and the board please visit www.ifpif.org. The funds hold more than \$6 Billion dollars in pension assets for suburban and downstate fire fighter pension funds. Funds will transition before June 30, 2022. Fire Protection Districts need a voice on their investments—and bring a well-rounded voice to this new pension fund. Please mark your calendars to mail in your ballot in November.



Dave Geary is currently the Fire Chief in Wauconda, was a Fire District business manager and also has extensive experience as a Village Administrator. He serves as President of the Wauconda Parks Foundation, is a Lions Club member and holds membership in the Sons of the American Legion. He has served the Wauconda community for over 40 years, and is well versed in financial matters and pension challenges.

John Perry is currently the Trustee / Treasurer of Lisle-Woodridge FPD and was a Village Administrator for over 35 years. He managed a fire department for over 17 years as Village Manager. Johns experience includes, founding member of the Intergovernmental Risk Management Agency (IRMA) which he chaired, President of the Illinois City/County Management Association, Charter member of the Illinois Public Employer Labor Relations Association (IPELRA), DuPage County ETSB and chair of its Interoperability Task Force, chair of IML Mangers Committee and founder of the Suburban Housing Coalition. He is a long time Rotarian serving 3 terms as chapter President.

The article was written by Brent Frank, President of the Lisle-Woodridge Fire Protection District and NIAFPD board member.

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fund finds a line-of-duty injury, the workers' compensation adjudicators potentially cannot later arrive to the opposite conclusion. Similarly, if an employee's injury is finally decreed to be non-compensable under workers' compensation, the pension board might not be able to find there was a line-of-duty injury.

Since one employee injury proceeding could impact the other, municipalities sometimes feel obligated to intervene in disability pension matters.

Q: Under what circumstances can a municipality's interest in ensuring a fully developed record sustain intervention?

Municipalities also cite "ensuring a fully developed factual record" as an interest that may sustain intervention. In the *Portincaso* case, the court ruled the municipality had interest in supplementing the pension board's record with a freshly decided workers' compensation decision.

However, recent caselaw suggests that a municipality cannot make a mere promise to help augment the record. Instead, the municipality must have evidence the pension board does not have. For instance, in *Stickney*, the denial of an intervention request was proper, in part, because the municipality failed to make an offer of proof of new evidence. The same conclusion was reached more recently in *City of Peoria v. Firefighters' Pension Fund of City of Peoria*, 2019 IL App (3d) 190069, ¶ 29.

Q: Can a pension board impose reasonable restrictions on intervention?

Yes. Even if a pension board allows intervention, it may impose reasonable restrictions on the extent of the intervenor's participation. However, a pension board must exercise its discretion to limit participation with care.

Whether a restriction on intervention is reasonable usually depends on the needs of the matter. For instance, if a municipality

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offers 20 witnesses to testify in a "simple" disability matter, then the pension board would be within its rights to limit the municipality to 3 witnesses. Similarly, if the municipality's cross-examination of a witness becomes excessive, the pension board could properly impose a time limit.

Q: What happens if a court determines the pension board abused its discretion in allowing or denying a petition on intervention?

Pension boards should take care in deciding intervention issues, as arriving at the wrong answer may result in a costly "do over." If a reviewing court determines

that there was a defect in the disability hearing (e.g., a municipality was allowed intervention when it should not have been or, conversely, the municipality was denied intervention but should not have been), the matter could be remanded back to the board for a new hearing to allow the municipality to participate.

Conclusion

Intervention in disability pension matters is complex. To make matters worse, Illinois courts have not fully developed this area of law. Therefore, pension boards should partner with counsel in tackling intervention issues. ■

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