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Pension Board has standing to recover excess disability benefits paid in addition to Workers' Compensation benefits.

A police officer with 25 years of credited service suffered a permanent injury. The officer applied and qualified for regular service retirement benefits, and the benefits began in 1998. The officer then applied for disability benefits from the Pension Fund, which were approved, and the Pension Board retroactively converted the service retirement to a disability retirement. Later, the officer filed a claim under Workers' Compensation, and he was awarded benefits effective from 1998, but the

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City refused to pay the benefits. In 2006, the City settled the officer's Workers' Compensation claim and paid the award. The officer now possessed both Workers' Compensation and disability benefits for the same period of disability. As a result, the Pension Board sent the officer a letter seeking total reimbursement of the disability pension benefits he received. However, the officer refused to reimburse the Pension Fund. The Pension Board filed a breach of contract and unjust enrichment action, arguing that it was entitled to recover the disability pension benefits it paid the officer in the form of a dollar-for-dollar credit for the Workers' Compensation benefits paid for the same period of disability. The officer argued that the Pension Board did not have standing to recover the disability pension benefits since the Pension Board and the City are distinct entities. The court found that the Pension Board unequivocally has standing to recover the excess disability benefits because the City and the Pension Board are the same entity, and the pension code confers standing on the Pension Board by ordinance. The court found that the Pension Fund was entitled to reimbursement of disability pension benefits it paid to the officer at the same time he was receiving Workers' Compensation benefits.

City of Philadelphia, Bd. of Pensions and Retirement v. Clayton, 987 A.2d 1255 (Pa. Cmwlth. 2009)

Pre-planned training exercise could not be classified as an emergency.

In 2005, a firefighter responded to a live-fire training exercise in which his superior instructed him to treat the exercise as though it were an actual emergency call. The firefighter and his crew responded with lights and sirens running on the truck. The team was to rescue a "dummy" victim from the fire and to advance the fire hose into the building to contain the fire. The firefighter put on full fire protection gear including a breathing apparatus, and entered the building. The building was full of smoke with no visibility. The firefighter found and removed the dummy victim on the second floor, and then he and his crew advanced a hose line through the building. As they continued to the third floor, the hose became entangled and the firefighter followed the hose line back to the obstruction. The hose was wrapped around a love seat. When the firefighter moved the love seat, he severely injured his left shoulder. The firefighter applied for a line-of-duty disability pension from the fire district, which was granted. He also applied for health coverage benefits under the Public Safety Employee Benefits Act ("Act"). The Act provides firefighters and their families continuing health benefits following a catastrophic injury while responding to what he or she reasonably believed was an emergency. After reviewing the firefighter's application and the facts of the case alongside the requirements of the Act, the Board of Trustees denied his application, finding that the firefighter was not

responding to what he reasonably believed was an emergency at the time of his injury, and the firefighter appealed. The court found that an "emergency" under the Act occurs when an incident is urgent and calls for immediate action. Therefore, the court determined that the firefighter did not reasonably believe that he was responding to an emergency. The training exercise was not an "emergency" because the firefighter was told that the goal of the training exercise was to rescue a dummy victim and advance the fire hose to put out the fire. The court upheld the Board's decision finding that by definition, these pre-planned situations cannot be classified as an unforeseen combination of circumstance for which the Act would provide continuing health benefits.

Gaffney v. Board of Trustees of Orlando Fire Protection Dist., 921 N.E.2d 778 (Ill. App. 1 Dist. 2009)

Mandatory retirement performance test is not required since Health and Human Services never promulgated any test.

The Age Discrimination in Employment Act (ADEA) contains an exemption that allows State and local governments to set mandatory retirement ages for law enforcement officers and firefighters. In 1974, Congress extended the ADEA to cover government employees. Once the ADEA became applicable to their employees, States and localities could retain maximum hiring and retirement ages only if they could show that age was a bona fide occupational qualification for a particular position. A safe harbor provision was created in 1996 that allowed a public employer to impose mandatory retirement on public safety officers at the higher of the age of retirement that was in place before the ADEA was found to apply to public employers, the age limit enacted after 1996, or age 55. After the 1996 legislation, the Health and Human Services Secretary ("HHS") was supposed to develop guidelines on the use of a physical and mental fitness test to assess competency of public safety personnel. However, no tests have been issued for use when considering mandatory retirement. In 2003, the Puerto Rico legislature amended its mandatory retirement law for police and firefighters from 65 to 55. Four days after the mandatory retirement age was lowered, a group of officers who were 55 were forced to retire. The officers brought a law suit alleging violations of the ADEA, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The court found that a state statute lowering the retirement age for public safety personnel is permitted by the 1996 amendment so long as the amendment's other requirements are met. The officers next claimed that even if they were lawfully subject to the mandatory retirement age, Puerto Rico had to give them the opportunity to avoid discharge by taking a performance test that could prove their

mental and physical fitness to continue working. However, the court found that the performance test is not required because the HHS never promulgated the appropriate test.

Correa v. Fortuno, 573 F.3d 1 (1st Cir. 2009)

Applicant bears the burden of proving that he was a member of the retirement system.

A police officer attended the University of Washington between 1968 and 1972. While a student, the officer began working as a janitor at the University's health sciences complex between 1970 and 1972. In 1974, the City of Tukwila hired him as a police officer, and he immediately joined the Washington State Law Enforcement Officers' and Fire Fighters' retirement system (LEOFF). In 1991, the officer started working as an investigator for the Washington State Attorney General's office. Since he was already receiving LEOFF retirement benefits, he was not permitted to join Public Employee Retirement System (PERS). However, in 1995, the Department adopted a rule stating that the prohibition is inapplicable if a person can establish membership in PERS before 1976. The officer claimed he qualified for PERS membership under this rule based on his janitorial work between June 1970 and June 1972. He remembered working 20 hours a week throughout this period. He also remembered filling out a PERS enrollment form and deductions taken out of his janitorial pay for Social Security and PERS contributions. Despite a comprehensive search, the officer could not find any records documenting his janitor job, related social security tax payments, or PERS contributions. In addition, University personnel could not find any of his employment records. They found no record of the officer's PERS enrollment form or PERS contributions. Social Security records showed no earnings for the officer's employment at the University. The Department also searched its records, but found no evidence to support his claim, and the officer could not find any federal income tax records for the period between 1970 and 1972. After the Department denied the officer's claim for PERS membership and service credits, he appealed. The officer essentially asked the court to reweigh the evidence and come to the contrary conclusion that he was a member of PERS. It is well established that on factual questions the reviewing court cannot substitute its interpretation of the facts for the agency's interpretation or reweigh the evidence. Here, the officer presented some evidence that he worked in a PERS eligible position prior to 1976, but the Department found it insufficient to satisfy his burden of proof. Since the Department correctly allocated the burden of proof to the officer and substantial evidence supports the denial, the court upheld the Department's denial of benefits.

Fox v. State, Dept. of Retirement Systems, Not Reported in P.3d, 2009 WL 4046584 (Wash. App. Div. 1 2009)

Multiemployer Pension Plan Amendments Act (“MPPAA”) liability can arise from a collective bargaining agreement or as a result of a duty under applicable labor management relations laws as defined by MPPAA.

A corporation that manufactured heating and cooling products entered into an agreement with Top Transportation Services, Inc. (“Top”), under which Top agreed to provide the corporation with truck drivers. Under the agreement, Top paid the drivers’ salaries and benefits, and then sought reimbursement for those costs from the corporation. The agreement provided that Top shall bill the corporation its actual costs and expenses of operations. Such costs and expenses included direct wages, salary payments, payroll taxes and necessary fringe benefits, insurance and administration applicable to the operations. The agreement also provided that Top will handle all labor relations and the negotiating of union contracts and shall enter into any and all labor contracts covering the drivers who are its drivers and are in the service of the corporation. Per that provision, Top was a signatory to collective bargaining agreements with Local Union. Those agreements required Top to make contributions to a pension fund, which is a multiemployer pension plan as defined by the Employment Retirement Income Security Act (“ERISA”), on behalf of the drivers. Top invoiced the corporation for Top’s contributions to the Fund, and then reimbursed Top those amounts. The corporation later terminated its agreement with Top, which in turn ceased all operations the following month. That cessation triggered withdrawal liability under the MPPAA. The Fund demanded payment of the MPPAA liability from both Top and the corporation. Top never paid the assessment, but it did invoice the corporation for the assessment. The corporation did not pay the assessment or the invoice. The Fund then sued the corporation asserting that the corporation owed withdrawal liability under the MPPAA and that the corporation breached its agreement with Top when it failed to pay Top’s invoice for the assessment amount. The district court granted summary judgment to the corporation, and the Fund appealed. The court first determined whether an entity is an employer under the MPPAA by asking whether the entity has an obligation to contribute to a plan. The obligation to contribute to a plan can arise from a CBA or as a result of a duty under applicable labor management relations laws as defined by MPPAA. The court remanded the case for a determination as to whether the defendant had a non-contractual obligation to contribute to the plan under applicable labor management relations laws. The court then considered the Top’s claim for breach of contract. The court found the agreement required the corporation to reimburse Top for actual costs. Since Top never paid the MPPAA liability, Top never had any actual costs, and the court affirmed.

Central States, Southeast and Southwest Areas Pension Fund, v. International Comfort Products, 585 F. 3d 281 (6th Cir. 2009)

An elected official, characterized as both an employer and employee, may not provide themselves with an unreasonable accommodation.

Due to numerous health problems, a clerk declined to run for reelection as she knew that she would be unable to fulfill the duties for another term. The clerk then sought disability benefits. The hearing officer recommended that the clerk's application be denied. Since the clerk was her own supervisor, and she was the one who granted her own accommodations, the hearing officer found that she could grant herself unlimited accommodations and perform her duties. The accommodations consisted of being absent from the office half of the time, and delegating her work duties, including the supervision of subordinate employees. The issue becomes whether accommodations, which are reasonable at their inception, can become unreasonable with the passage of time. The Board argued that an elected official, characterized by the Board as both an employer and employee, may provide any accommodation to themselves and thus magically pronounce that the accommodation so provided was reasonable. The court disagreed, and found that the argument usurps the responsibility of the hearing officer in determining if the accommodation is reasonable. The court stated that the clerk's supervisory duties were clearly an essential function of her job, and delegation of such duties were unreasonable accommodations. The court found that the clerk's accommodations (spending half of her time at home, and delegating her supervisory) constituted an unreasonable accommodation, and reversed the Board's decision.

Kentucky Retirement Systems v. Martin, __ S.W.3d __, 2009 WL 1423991 (Ky. App. 2009)

Pension Board must determine whether denying a benefit was required to maintain its tax qualified status.

A retired member of the Public Employees Retirement System ("PERS") named her long-time, same-sex domestic partner as her beneficiary. When the relationship ended, the employee formally requested that PERS change her service retirement annuity from a joint annuity to a single life annuity under the "pop-up" election. This change would have increased her monthly benefit amount and removed her beneficiary. PERS denied the request explaining that the "pop-up" election was not triggered under the pension code because the beneficiary was still alive and the employee did not marry or divorce her designated beneficiary. After PERS denied the request to change her benefits, the employee requested an administrative hearing, where the employee argued that PERS, denied them a benefit afforded to similarly situated individuals based upon her inability to have married her domestic

partner due to her sexual orientation, in violation of the Oregon Constitution. PERS denied the change explaining that it does not have the legal authority to grant the relief sought. The employee appealed arguing that because the pension code made no provision for an election by members who have separated from their same-sex domestic partners, it is unconstitutional in that it denies her rights equal to those of married persons. The court found that the pension code requires that PERS make a determination regarding whether the election would cause a loss of tax-qualified status. However, PERS did not make that determination. Instead, the PERS concluded that allowing the employee to use the "pop-up" option would place the PERS's tax qualification in peril and that the employee demanded a remedy that presents a substantial risk to the tax qualified status of the PERS. The court held that this finding was qualitatively different from a finding that the denial of employee's election was required to maintain PERS's tax-qualified status.

English v. Public Employees Retirement Bd., 216 P.3d 342 (Or. App. 2009)

Court upholds denial of enhanced duty-related benefits based on substantial evidence in the record.

A paramedic worked for approximately 25 years before she was forced to resign because of pain in her hip joints. The paramedic applied for disability benefits from the Public Employees Retirement Association ("PERA"), which granted her request for basic disability benefits. However, PERA denied the paramedic's request for enhanced duty-related disability benefits on the ground that her disability was not caused by an injury that was sustained in the performance of her duties as a paramedic, and she appealed. The paramedic argued that she should receive enhanced duty-related disability benefits because her paramedic duties substantially contributed to her hip condition. The paramedic argued that PERA erred by finding that she did not satisfy the statutory criteria for enhanced duty-related disability benefits. In light of the plain language of the statute, an applicant must establish three facts to be eligible for enhanced duty-related disability benefits: (1) the existence of an injury, sickness, or other disability, (2) that the injury, sickness, or other disability was incurred in or arose out of any act of duty, and (3) that the applicant became physically unfit to perform her duties as a direct result of the injury, sickness, or other disease. The only requirement in dispute is whether the hip condition was incurred in any act of duty she performed as a paramedic. To satisfy this requirement, the paramedic must establish a causal connection between her disability and a task or function that was performed by her. The agency record contained conflicting evidence as to whether the hip condition was the result of any act of duty she performed as a paramedic. The paramedic relied on her own

doctor's opinion who initially concluded that the condition was not related to a previous illness/injury but later asserted that her condition was partially attributable to her paramedic duties. However, her doctor never retracted his earlier conclusion that the hip condition was partially attributable to early osteoarthritis and degenerative joint disease, which progresses over time. PERA relied on its own examining physician's opinion which was the hip condition was not caused by her duties as a paramedic. The court found PERA's decision was based on substantial evidence consisting of the examining physician's statement that the hip condition was not an injury, sickness, or disability that was caused by any act of duty.

In re Johnson, Not Reported in N.W.2d, 2009 WL 2447371 (Minn. App. 2009)

A surviving spouse may not elect a benefit option that was unavailable to the member at the time of his retirement.

A former corrections employee retired at the age of 44 with a disability annuity. After receiving a disability annuity for nearly 16 years, the employee died in 2005. At the time of his retirement, the code provided two options for members of the employee's age who applied for a disability annuity: (1) members could withdraw their contributions, or (2) receive a disability annuity. The employee elected to receive the annuity, but the disability annuity did not allow a member to elect a joint and survivor benefit. However, at the time of his death, the employee's surviving spouse filed a request for a survivor benefit with the Board. The Board denied the survivor's request on the basis that the employee was not entitled to elect an annuity option that provided for a survivor benefit at the time of retirement, and the survivor appealed. The Board offered into evidence the employee's application for a disability annuity. On the form, the employee acknowledged that he was entitled to a disability annuity only. The surviving spouse submitted various documents indicating that the employee named her and his stepchildren as beneficiaries of his state pension and state-sponsored life insurance. However, the court found that at the relevant time the retirement code did not permit members of the employee's age to elect an annuity with a survivor benefit. The court rejected the survivor's arguments that subsequent amendments to the retirement code, which reduced the number of credited service years required for a survivor benefit, applied retroactively. There is nothing permitting the surviving spouse to elect a benefit option which was unavailable to the employee at the time of his retirement.

Teti v. State Employees' Retirement Bd., 981 A.2d 399 (Pa. Cmwlth. 2009)

Board is vested with the power to weigh conflicting medical evidence and credit the more compelling evidence.

A stenographer for a city was exposed to fireproofing materials twice in one summer. She sought medical attention for numerous physical ailments-including difficulty breathing, burning in her eyes, burning in her mouth, and swelling in her hands. The stenographer stopped working after she began experiencing similar symptoms when she came into contact with a variety of other materials, including paint and certain office supplies. The stenographer has not returned to work since that time and applied for disability retirement benefits. After her application was denied by the comptroller, the stenographer appealed. In this case, the stenographer attempted to prove that she was incapacitated due to chemical sensitivity by submitting medical records from five treating physicians. Two of those physicians opined that the stenographer was totally and permanently disabled as a result of her exposure to multiple chemicals. However, one of the two subsequently asserted that she could return to work if she was not subjected to respiratory hazards. The other physician acknowledged that the overwhelming consensus in the medical and scientific community is that inadequate evidence exists to unequivocally back any scientific theory of causation as to multiple chemical sensitivity. To rebut the stenographer's evidence, the city relied on the opinions of two independent medical examiners ("IME") who reached contrary conclusions regarding the severity of the stenographer's disability. One IME remained unconvinced that she had demonstrated disease in any area, and the second IME found that the stenographer was not disabled from performing her duties as a stenographer. Where there is conflicting medical evidence, the comptroller is vested with the exclusive authority to weigh such evidence and credit the opinion of one medical expert over another. The court found that the credited experts articulated rational and fact-based opinions founded upon pertinent medical records and a physical examination of the stenographer. The court held that the comptroller's determination was supported by substantial evidence and upheld the decision.

Hammond-Timpano v. New York State and Local Retirement System, 885 N.Y.S.2d 780 (N.Y.A.D. 3 Dept. 2009)

An employee was not totally and permanently disabled where evidence showed a successful recovery.

An administrative specialist's job duties included opening mail, entering data, filing, faxing, and answering the phones. The specialist's job required her to sit 6 hours a day, lift up to 50 pounds occasionally, and walk extensively. The specialist sought

medical attention for persistent left hip and thigh pain. An MRI examination revealed a cancerous lesion. The employee underwent surgery to remove the lesion, and to reconstruct her left femur. Following the surgery, the employee was required to walk with a cane, and she applied for disability retirement benefits, which were denied by the medical review board on two occasions. A formal administrative hearing was conducted, and the hearing officer issued a recommended order which recommended denial of disability retirement benefits. The Board adopted the hearing officer's recommended order as its final order, and the employee appealed. She argued that the Board's decision was arbitrary, capricious, and not supported by substantial evidence. Giving deference to the finder of fact, the court found that the evidence did not compel a finding that the employee was permanently physically incapacitated to perform the job, or like duties, from which she received her last paid employment. Although the evidence demonstrated that the specialist underwent a radical operation to reconstruct her left femur, the evidence also demonstrated a successful recovery. The employee has not experienced a recurrence of the lesion, she was not currently taking any pain medications, and she was not currently receiving physical therapy. Although she still required the use of a cane, there was no medical evidence which corroborated her belief that she cannot perform her work duties. Even though there was some conflicting evidence in the record, the court concluded that the evidence did not compel a ruling in her favor, and the court affirmed the Board's decision.

Stivers v. Kentucky Retirement Systems, Not Reported in S.W.3d, 2009 WL 5125077 (Ky. App. 2009)

Board may deny payment for experimental treatments.

An employee participated in a retirement plan which also provided health and welfare benefits. The employee was diagnosed with chronic lymphocytic leukemia (CLL). The employee's physician treated his condition with conventional therapies, but the disease progressed. At the employee's request, the Plan pre-approved his participation in a clinical study open only to CLL patients for whom standard treatments had failed. The employee required further treatment involving "salvage therapy with experimental therapeutics," and recommended that he undergo a stem cell transplant (the Transplant). The employee and his physician requested pre-approval, but the Plan denied it as experimental and excluded from coverage. The physician requested another review, and the Plan engaged a panel of three independent experts, asking them to determine whether sufficient evidence existed to demonstrate that the Transplant was "more likely than not to be more beneficial than standard treatments or procedures." One expert said yes, two said no; because

the majority answered in the negative, the Plan again denied the employee's claim. After exhausting his administrative remedies, the employee sued the Plan seeking to compel pre-approval of and payment for the Transplant. The court found that a participant is not entitled to payment of any charge for care, treatment, services, or supplies which are not medically necessary, or are not uniformly and professionally endorsed by the general medical community as standard medical care, treatment, services, or supplies. The court found that the trustees were entitled to interpret the terms of the plan and they rationally interpreted the plan as excluding experimental procedures because they are not standard care. The court held that the trustees properly denied the experimental treatment.

Klein v. Central States, Southeast and Southwest Areas Health and Welfare Plan, 346 Fed. Appx. 1 (6th Cir. 2009)

Following orders of a commanding officer is part of a police officer's job duties.

A police officer employed by the City of Newburgh Police Department, sustained a back injury in 2005 while changing a flat tire on his patrol car. His subsequent application for accidental disability retirement benefits was denied on the ground that the incident did not constitute an accident within the meaning of the Retirement Plan. The officer requested a hearing and redetermination, following which a Hearing Officer denied the application on the same ground. The City adopted that decision, and the officer appealed. The officer, as an applicant, bears the burden of demonstrating that his disability arose out of an accident as defined by the Retirement System, and the City's determination in that regard will be upheld if supported by substantial evidence. An injury that occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury. Here, the officer testified that a mechanic would ordinarily be dispatched to change a flat tire on a patrol car and that he had never changed a flat tire before. However, the officer's watch commander had directed him to change the tire when a mechanic proved unavailable. The officer further testified that his duties included following the orders of his watch commander, and that the job description of a Newburgh police officer includes a duty to maintain department equipment. Accordingly, the court found that substantial evidence supported the City's determination that petitioner was injured while performing a task inherent in his regular employment duties.

Rolon v. DiNapoli, 889 N.Y.S. 2d 303 (N.Y.A.D. 3 Dept. 2009)

An injury occurring without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties is not an accidental injury.

A detective was returning to the squad room after interviewing a witness and parked his unmarked vehicle too closely to the police car occupying the adjacent parking spot. Unable to fully extend the vehicle's door, the officer cracked his head up on the doorjamb while forcing himself up out of the seat to get out of the car. He performed light-duty work for approximately 10 weeks after the incident, but did not return to work. The detective applied for accidental disability retirement benefits, but he was denied. Following disapproval of his application, he requested a hearing and redetermination. At the hearing, the Hearing Officer concluded that the incidents did not constitute an accident within the meaning of the retirement code. The comptroller adopted the Hearing Officer's decision, and the detective appealed. The court found that an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties is not an accidental injury. Inasmuch as the detective testified that his job duties include responding to crime scenes, rounding up witnesses and "going out and arrest bad guys," activities that necessarily require his getting into and out of a police car, substantial evidence supports the determination that the event precipitating his neck injury was a risk inherent in the performance of his routine duties. Giving appropriate deference to the comptroller's credibility resolutions, the court found no basis on which to disturb his determination.

Lorenzo v. DiNapoli, 889 N.Y.S.2d 126 (N.Y.A.D. 3 Dept. 2009)

Statute of limitations begins when a party receives oral or written notice, or when the party knows or should have known of an adverse determination.

Petitioner was wrongfully denied membership in New York State and Local Employees' Retirement System and her records were later lost, resulting in her being deprived of an opportunity to buy back her time. An initial hearing was held to determine petitioner's status in the Retirement System but the hearing was adjourned several times before it was finally held. At the hearing, the hearing officer denied the request for an adjournment and granted the Retirement System's motion to dismiss the case based on petitioner's failure to proceed. Petitioner's attorney received the order of dismissal, and petitioner sought reversal of the order of dismissal more than four months later. The Retirement System moved to dismiss on the basis that it was barred by the statute of limitations, which was granted and the petitioner appealed. In New York, a party seeking to challenge an administrative

determination must do so within four months of the decision becoming final and binding. The statute of limitations begins to run when the party receives oral or written notice, or when the party knows or should have known, of the adverse determination. Where a party is represented by counsel, the statute of limitations does not begin to run until the attorney receives the required notice in the proper form. In this case, the record reflects that petitioner clearly articulated, and all parties understood, that she was represented by counsel. In addition, petitioner unequivocally stated at the hearing that she wanted all documents to be sent to her attorney. Thus, the statute of limitations began to run when her counsel received the written order of dismissal more than four months before she commenced this proceeding. Accordingly, the court granted the motion to dismiss.

Singer v. New York State and Local Employees' Retirement System, 891 N.Y.S.2d 742 (N.Y.A.D. 3 Dept. 2010)

The finder of fact is vested with the authority to resolve conflicting medical evidence and to credit the opinion of one expert over that of another.

A keyboard specialist applied for disability retirement benefits asserting that she was permanently disabled due to lower back pain, neck pain, headaches, and cervical radiculopathy. After her application was disapproved, the specialist requested a redetermination and a hearing was held. Following the hearing, a Hearing Officer denied the application on the basis that the specialist had failed to establish that she was permanently incapacitated from performing her job duties. The Comptroller made two supplemental findings of fact and a supplemental conclusion of law, but otherwise accepted the Hearing Officer's determination, and the specialist appealed. A disability applicant bears the burden of proving that he or she is permanently incapacitated from performing the duties associated with his or her employment. If conflicting medical evidence is presented on this issue, the finder of fact is vested with the authority to resolve such conflict and to credit the opinion of one expert over that of another. The fact finder's determination will be upheld if it is supported by substantial evidence in the form of a rational and fact-based, articulated medical opinion. In this case, one of the specialist's treating physicians opined that she was permanently disabled. However, two physicians found that she was not permanently incapacitated from performing her job duties. The independent medical examiner likewise opined that the specialist was not permanently disabled or unable to perform the functions of a keyboard specialist. Accordingly, the court did not disturb the Comptroller's decision.

Salik v. New York State and Local Employees' Retirement System, 892 N.Y.S.2d 636 (N.Y.A.D. 3 Dept. 2010)

The time for review of a final administrative decision must be commenced by filing a complaint and the issuance of summons within the jurisdictional time limit.

A firefighter suffered a spinal-cord injury in the line of duty, and he applied for a "line-of-duty" disability pension. Later, the firefighter voluntarily withdrew his "line-of-duty" pension application, and instead filed a new application with the fund seeking a "not-on-duty" disability pension to be paid retroactive to June 1, 2005, the date of his first (line-of-duty) application. The Board granted the "not-on-duty" disability pension, and ordered the benefits be paid retroactive to February 1, 2008, the date which the firefighter applied for "not-on-duty." The firefighter filed a complaint arguing that the Board erred in setting the commencement date as February 1, 2008, as he argued that the proper commencement date was June 1, 2005, the date the firefighter filed his initial "line-of-duty" disability pension application. While the Code is to be liberally construed in favor of the covered worker, this does not mean the Board erred in setting February 1, 2008, instead of June 1, 2005, as the commencement date of the firefighter's "not-on-duty" disability pension. The court found that it is unrealistic for a disability applicant to request that his benefits relate back to a time prior to the filing of an application. Such a claim of entitlement would subject a Pension Board to uncertainty as to the extent of its financial exposure for claims that have yet to come to fruition. Pension Boards need to know what potential claims are outstanding so they can effectively manage available funds. Further, the Board's decision to allow the firefighter to withdraw his application for a "line-of-duty" pension terminated any proceedings before the Board. No review of that decision was sought by either party. The court noted that every action to review a final administrative decision must be commenced by filing a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision. This 35-day limit is jurisdictional. Accordingly, when the Board allowed the firefighter's motion to withdraw his line-of-duty pension application, that was a final decision. Thirty-five days thereafter, the Board lost jurisdiction over that application. The record does not reflect that the firefighter ever argued to the Board that his pension should be made retroactive to his last day of pay. Further, this argument was not made in the firefighter's brief, nor could it have been made under the circumstances here-where this argument was never made to the Board. As a result, the firefighter forfeited this argument. Consequently, the Board did not err when it set the commencement of the firefighter's "not-on-duty" disability pension at February 1, 2008, the date he applied for the "not-on-duty" disability pension.

**Philpott v. Board of Trustees of City of Charleston Firefighters' Pension Fund,
___ N.E.2d ___, 2010 WL 145136 (Ill. App. 4 Dist. 2010)**

Uniform allowance did not qualify as regular compensation for the purpose of computing the retirement allowance.

A correction officer for the Suffolk County sheriff's office sustained serious disabling injuries in the course of his employment, and he applied for accidental disability retirement benefits pursuant to the pension code. During the officer's employment, he received holiday pay, a fitness bonus, a uniform allowance, longevity pay, and an educational differential that qualified as "regular compensation," as that term is used in the pension code, which was included in his salary for the purpose of calculating his retirement allowance. However, the Retirement Board (Board) decided that the above stated compensation did not fall within the definition of regular compensation. The officer appealed with the Contributory Retirement Appeal Board (CRAB), arguing that the Board erred in excluding the benefits from his regular compensation for purposes of calculating his retirement allowance. After a hearing, an administrative magistrate made detailed findings of fact and concluded that the Board properly excluded the holiday pay and fitness bonus in calculating his regular compensation, but the employee was entitled to have his recurring educational differential, annual longevity pay factored into the computation of his retirement allowance but excluded uniform allowance. The Board and the employee both appealed. The standard of review is well-settled: a court may set aside a CRAB decision if legally erroneous or unsupported by substantial evidence. The court upheld CRAB's decision declaring that the holiday pay and fitness bonus did not qualify as regular compensation for the purpose of calculating the retirement allowance. The court found that the uniform allowance did not qualify as regular compensation for the purpose of computing the officer's retirement allowance. The court reasoned that a uniform allowance is not a form of payment, or other compensation, for the services rendered by the employee; it is a benefit offered by the public employer as a matter of convenience so that its employees will be attired in standard and identifiable clothing on the job, especially in light of the potentially dangerous setting in which the employees work. The uniform is a "tool" required to be used by the employees in the sheriff's office, rather than compensation.

O'Brien v. Contributory Retirement Appeal Bd., __ N.E.2d __, 2010 WL 537098 (Mass. App. Ct. 2010)

Former spouse of a member is only entitled to benefits that accumulated during the marriage.

A former Sheriff was a member of the California Public Employees' Retirement System (CalPERS). In 1995, the Sheriff transferred 8.677 years of service credit to

his former wife (First Wife), which represented her one-half interest in the service credit the Sheriff earned during their marriage. The Sheriff, who was then married to his current wife (Second Wife), exercised his right to redeposit the contributions and paid for it with community funds through monthly deductions from his salary. The Sheriff and First Wife later separated, and by that time, they had redeposited about 70% of the scheduled payments. The question arose: What was the proper division of the Sheriff's service credit received during his second marriage. Generally, all property acquired during a marriage prior to separation is community property, which includes the right to retirement benefits accrued by the Sheriff as deferred compensation for services rendered. The service credit at issue here was contributed by the employer and was not attributable to employment during the Sheriff's second marriage. Instead, it was earned during the Sheriff's first marriage and was originally an asset of that community. The obligation of the employer to contribute to the pension derived from the Sheriff's service during the first marriage. Accordingly, the Second Wife had a claim only on the component of benefits relating to the time period of the second marriage, and was entitled only to a pro tanto share of that portion of Sheriff's retirement allowance. In other words, the Second Wife was entitled to the salary contributed by the Sheriff and the appreciation of those funds during their marriage. However, the Second Wife was not entitled to any portion of the contributions attributed to the employer for the time he was employed and married to the First Wife.

In re Marriage of Sonne, __ Cal.Rptr.3d __, 2010 WL 597225 (Cal. 2010)

CALIFORNIA SUPREME COURT SETTLES SAN DIEGO PENSION ISSUE

In a closely watched case of particular interest to governmental defined benefit pension boards, the California Supreme Court held on Monday, January 25th that multiple felony conflict of interest indictments against five San Diego pension trustees should have been dismissed. The Court recognized that while it was true that the five trustee defendants were financially interested in the pension amendments they voted on, nevertheless, this was not improper since the identical financial interest was shared with several thousand members of the retirement system. According to the Court, the fact that employee trustees who were elected by the membership are stake holders does not present a voting conflict, but rather is an inevitable result of the intentional composition of many retirement boards.

By contrast, the Court refused to dismiss charges against the remaining and sixth defendant, who was accused of voting on a “unique” and “personalized pension benefit.” Where a trustee had allegedly obtained “customized, specially tailored” benefits, the Court was unwilling to apply the statutory exceptions protecting the other five defendants.

Accordingly, trustees are properly entitled to vote on matters in which they share a generalized financial interest in common with the membership. Otherwise described by the Court, the public services exception to Section 1090 applies if the interest in question “is not personal to an employee or official because it is shared with like members of the public agency’s constituency.” Ordinary pension board decisions which commonly affect the financial interests of employees do not present the kind of systemic danger that California’s conflict of interest laws were designed to criminalize.

As observed in the opening sentence of the case of Lexin v. The Superior Court of San Diego County, the case arose out of the fiscal crisis that swept the City of San Diego over the past decade. The criminal indictments were brought against a backdrop of political upheaval and class action litigation, where the City was alleged to have failed to adequately fund its retirement system, federal investigations had been brought involving the City’s bond disclosures, and where the City’s credit rating had been compromised.

In 2005, the Lexin defendants were charged with felony violations of Section 1090 of California’s conflict of interest laws for allegedly voting three years earlier to allow the City to underfund its retirement system in exchange for the City’s agreeing to increase pension benefits for City employees. The defendants moved to set aside the criminal charges arguing that (1) Section 1090 did not apply and (2) even if it did, their interest in their pension benefits was covered by the salary and public services exceptions to Section 1090.

The Court concluded that when voting on amendments applicable to the membership as a whole, trustees are covered by the public services exception since they are not ordinarily burdened by a prohibited conflict between their duties as public servants and their own personal financial gain. The public services exception, Section 1091.5(a)(3), recognizes that financial interests shared with one’s constituency do not present the dangers the state’s conflict of interest laws were designed to prevent as long as there is no “differentiation between their financial interests and the financial interests of those they represent.” In so holding, the Court rejected the argument that trustees were required to follow an antiseptic, disinterested model of decision making.

In interpreting the statutes, the Court harmonized Section 1090 and the applicable pension provisions mandating employee participation on retirement boards. In examining the nature and composition of public pension boards, the Court was

mindful that the Legislature has long embraced the principle of employee representation. According to the Court, it is “quite clear the Legislature *intended* for retirement board trustees to share interests with their memberships.” The Court further recognized that having trustees who share the interests of their constituents was beneficial.

Citing President Lincoln’s Gettysburg Address, the Court indicated that one of the corollaries of a republican form of government is that in a “government of the people, by the people, for the people,” public officials will often be part of their own constituencies, at once representatives and members of the class they represent, at once governors and the governed. Accordingly, under the public services exception, an interest is not personal, and poses no “two masters” problem, if it is shared with, and undifferentiated from the interest of, the members of the broad class of constituents a public official represents.

The Court further reasoned that by mandating employee representation on retirement boards, the Legislature did not intend that these same employee trustees would be second class citizens on their boards, prevented from participating on important votes.

While the Court held that the public services exception applied, the Court determined that the salary exception did not. According to the Court, the government salary exception was intended to apply to situations where the board of which an official is a member is contemplating a contract with a government entity for which the official also works.

Recognizing that Section 1091.5(a)(9)’s salary exception is not a model of clarity, the Court turned to legislative history and attempted to view the statutory scheme in its entirety. The Court summarized the salary exception as follows, applying in at least two archetypal situations:

The first, the scenario the Legislature expressly contemplated, involves a first party contract: an official has an existing employment relationship with government entity A and also, in a separate capacity, has the power to make or influence contracts made by A (other than those sought by his or her own specific department), as with the city police officer/city council member.

The second involves a second party contract: an official who makes or influences contracts on behalf of government entity A is put in a

position of considering a contract with government entity B, for which he or she also works.

The Court held that the salary exception does not extend “to contracts that more directly affect one’s interests by involving one’s own department, or most directly affect one’s interests by actually altering the terms of one’s employment” because such interests directly implicate the “two masters” problems Section 1090 was designed to eliminate.

After considering the text of the statute, judicial and Attorney General interpretations, and the surrounding statutory scheme, the Court concluded that Section 1091.5(a)(3)’s public services exception should be read as establishing the following rule:

If the financial interest arises in the context of the affected official’s or employee’s role as a constituent of his or her public agency and recipient of its services, there is no conflict so long as the services are broadly available to all others similarly situated, rather than narrowly tailored to specially favor any official or group of officials, and are provided on substantially the same terms as for any other constituent.

Accordingly, the public services exception in California permits retirement boards to enter contracts that affect trustee pension benefits, provided that the effect is the same upon constituents who are not trustees.

As described by the Court, under a disinterested model of decisionmaking, one might seek fairness and competence through a decisional body composed entirely of individuals cleansed of any direct stake in the outcome, for example blue ribbon panels or outside experts. Alternatively, under the interested model of decisionmaking, a blend of individuals, each with a clear stake in many decisions, assumes that through the representation of all stakeholders, fair and wise decisions will emerge. The Court understood that the Legislature and the City of San Diego have each “plainly chosen the latter model in composing public retirement boards.” NCPERS is pleased that the amicus brief it filed in the case played a constructive role in this outcome.

A prenuptial agreement waiving rights to ERISA benefits, signed by a deceased employee’s spouse does not constitute a valid waiver under ERISA.

An employee was employed by DuPont and participated in their retirement plan. Merrill Lynch managed and serviced the DuPont Account. The plan states that a participant may designate any beneficiary or beneficiaries they choose to receive all or part of their vested interest in their account in case of death, and they may replace

or revoke such designations. However, in the event the participant has a spouse, no designations of a person other than the spouse shall be permitted, unless such spouse has consented in writing. The employee retired from DuPont, and, following the death of his wife, the employee designated his six children as beneficiaries. Subsequently, the employee remarried, but prior to the marriage, the employee executed a prenuptial agreement wherein the new wife waived any rights to the employee's proceeds of his retirement account. However, the new wife never signed and delivered a formal waiver abdicating her rights in the DuPont retirement account prior to the employee's death. After several requests by the children for the proceeds of the retirement account, Merrill Lynch and DuPont refused to release the funds. The children filed an action against Merrill and DuPont ("Defendants") seeking an order requiring Defendants to release the funds to the children. The court addressed whether a prenuptial agreement constitutes a valid waiver of funds under an ERISA retirement plan. Courts have consistently held that prenuptial agreements are not valid spousal waivers within the meaning of ERISA. The court found that the prenuptial agreement signed by the deceased employee's second wife did not constitute a waiver under ERISA, and the court denied the children's claims to the benefits under the plan.

Robins v. Geisel, 666 F.Supp.2d 463 (D.N.J. 2009)

Testimony of specialists, coupled with the medical records, and risk factors, are sufficient to rebut a statutory heart presumption.

In 1999, a firefighter suffered hearing damage and tinnitus after the air horn of a fire engine was inadvertently discharged close to his right ear. He returned to full duty within a month of the incident. In 2004, he experienced severe chest pains while driving a fire truck in heavy traffic in response to an emergency. The firefighter was diagnosed with atherosclerotic heart disease, and underwent quadruple bypass surgery. The firefighter applied for accidental and performance of duty disability retirement benefits based on both incidents. The cardiovascular disease specialist, who examined the firefighter on behalf of the retirement system, diagnosed him with atherosclerosis, a disease in which plaque gradually accumulates in the arteries of the heart and which can progress more rapidly when certain risk factors are present. The specialist opined that the firefighter's heart disease was caused by the presence of multiple risk factors, including a family history of early heart disease, hypertension, elevated levels of cholesterol and heavy cigarette smoking. The specialist concluded, within a reasonable degree of medical certainty, neither job-related stress, the performance of firefighter duties, nor an incident where the firefighter inhaled smoke while fighting a fire, contributed to or caused his disability. As to the hearing impairment, it was undisputed that he returned to work within a month following the incident that impaired his hearing, and he continued to work on full duty as a firefighter until the heart incident. Further, the otolaryngologist (an ear nose

throat doctor), who examined the firefighter's hearing, opined that the firefighter had normal hearing and was able to hear adequately in normal speech frequencies. The otolaryngologist concluded that the firefighter was able perform the duties of a firefighter. Based on the examining physicians, the retirement system denied the applications, finding that the firefighter's disability was not a natural and proximate result of his job duties. The retirement system found that the statutory "heart presumption" that a firefighter's heart disease was incurred in the performance of his duties had been rebutted, and the firefighter appealed. The court upheld the retirement system's conclusion finding that the testimony of the specialists, coupled with the firefighter's medical records and the identified risk factors, were sufficient to rebut the statutory heart presumption. The court also found that the otolaryngologist's report provided the requisite substantial evidence to support the retirement system's determination and denial of disability benefits.

O'Sullivan v. DiNapoli, 892 N.Y.S. 2d 223 (N.Y.A.D. 3 Dept. 2009)

Plaintiffs must establish a substantial likelihood that they personally will be injured in the future by the government's policy absent a tangible loss at the government's hands.

Police officers and a police officers' association appealed from an order dismissing their amended complaint for lack of standing. Standing is a question of law reviewed de novo. The court found that the officers lacked standing because they failed to meet the injury-in-fact test. The officers argued that the City's alleged failure to maintain the Fund on an actuarially-sound basis is an actual, concrete harm. Even if the Fund is actuarially unsound, the officers failed to link the level of funding to any immediate, direct injury. Abstract injury is not enough. It must be alleged that the officers have sustained or are immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct. Even assuming that the City's use of the Fund's assets was improper, the officers failed to link that conduct to any concrete and actual injury. When plaintiffs have not already suffered a tangible loss at the government's hands, they must establish a substantial likelihood that they personally will be injured in the future by the government's policy. The officers failed to allege a substantial likelihood of future injury. The City's alleged refusal to augment the Fund after the Board of Trustees gave notice of unfunded liabilities did not constitute a systematic pattern or policy sufficient to confer standing in the context of a threat of future harm. The Association lacked standing because it did not demonstrate that its members would otherwise have standing to sue in their own right, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Dillon Police Officers' Ass'n v. City of Dillon, 333 Fed.Appx. 195 (9th Cir. 2009)

A member's request to change from a single-life annuity to a joint-survivorship annuity is invalidated by death before the board received the election.

A PERS member applied for retirement and elected to receive his pension benefits under a joint-survivorship annuity paying for life and thereafter paying his surviving spouse. The member designated his wife at that time as his beneficiary. Five years later, the member divorced his wife and elected to have his payment changed to a single-life annuity with no monthly payments to any surviving spouse. After remarriage, the member designated his new wife as his beneficiary, but he did not change his pension payment option. He continued to be paid a monthly benefit based on a single-life annuity. The member requested and was mailed an application to change his payment option. The member completed the application but he incorrectly elected all of the listed options instead of following the instructions and choosing only one. PERS returned the form with instructions that he was required to choose one payment option. The member completed and signed the corrected application to change from the single-life annuity to a joint-survivorship annuity with his wife as the beneficiary, and mailed it to PERS. The next day, the member died. PERS received the member's request to change his pension option after his death, and PERS refused the surviving spouse's request for survivor benefits. The surviving spouse sought a writ of mandamus to compel PERS to accept the election executed by the member and to pay her the monthly survivor benefit in accordance with that election. The court found that PERS did not act in an unreasonable, arbitrary, or unconscionable manner by denying the surviving spouse's request for survivorship benefits, because the member's election to change from a single-life annuity to a joint-survivorship annuity was invalidated by his death before the election ever became effective.

State ex rel. Shisler v. Ohio Public Employees Retirement System, 909 N.E.2d 610 (Ohio 2009)

Applicant could not be reinstated for the sole purpose of granting a disability pension.

A firefighter was injured on the job, and he filed an application for disability retirement. The City's Human Resources Department scheduled the firefighter for two independent medical examinations ("IME"). The physicians found that the firefighter was disabled from his duties. The firefighter voluntarily resigned from the department first by way of a signed, handwritten post-it note to the Fire Chief, which note read: "Dear Chief-I quit-Thank you," and, on the same date, by a signed,

handwritten letter to the Chief, which letter read, "As of 8/8/06 I Kevin Green resign from the Waterbury Fire Dept." On the very same date, he withdrew his application for disability and also notified human resources of his intent to withdraw his contributions to the pension fund and to rollover such amount to an individual retirement account ("IRA"). Subsequently, the firefighter wrote the Board, requesting his application for disability be reinstated and considered by the Board, and that the firefighter's request to withdraw funds from the City pension plan also be withdrawn and the funds be kept in place. The Board denied the request and the firefighter appealed. The court noted that the firefighter voluntarily resigned from his employment as a firefighter, he withdrew his disability application, and he requested a withdrawal of his pension contribution. At that time, the firefighter was no longer a contributing member of the system. The firefighter was no longer a member when he requested the Board permit reinstatement of his application for disability and he no longer met the requirements for the disability pension to which he had once been entitled. The ordinance expressly requires that disability pensions be awarded to those "participating" in the retirement system and in the service of the City when the application was being considered. The court noted that a post-termination applicant could not be reinstated for the sole purpose of granting a disability pension under the terms of the pension ordinance as such practices could lead to abuses of the retirement system.

Greene v. City of Waterbury Retirement Bd., Not Reported in A.2d, 2009 WL 3085561 (Conn. Super. 2009)

Board must articulate, with reasonable clarity, reasons why it credits the minority opinion over a majority opinion.

A police officer underwent a physical examination as required for employment with the Metropolitan Police Department ("MPD"). At that time she disclosed in her medical questionnaire that she had been diagnosed with asthma in 2001, with her last episode occurring in 2003. The officer was found to be medically qualified for employment with the MPD. The officer's second asthma attack occurred during physical training at police academy. During physical training at the academy, the officer suffered a second asthma attack while doing push ups. The pension board ("Board"), then convened to consider disability retirement for the officer based on a diagnosis of asthma. The Board issued an order finding that the officer was incapacitated from further duty by reason of a disability incurred other than in the performance of duty. The Board concluded that (1) the officer's asthma condition disabled her from useful and efficient service with the MPD; (2) her asthma was not incurred in the performance of duty; (3) she had less than five years of creditable

service; and (4) because she had less than five years of creditable service, the Board need not consider her capacity to occupy other employment. The officer appealed challenging the Board's conclusion that her asthma condition disables her for useful and efficient service with the Department. The court reversed finding that Board did not provide a persuasive reason for relying on the minority opinion of one general physician over those of a half dozen other physicians, at least four of whom are specialists in the medical condition at issue and one of whom is an internationally-recognized expert in the condition, who found that the officer was not permanently and totally disabled due to her asthma. The court stated that it could not determine that the evidence, upon which the Board's decision rested, was substantial. The court's principal function in reviewing administrative action is to assure that the agency has given full and reasoned consideration to all material facts and issues. This requires agencies to provide the basis of their order by an articulation with reasonable clarity of its reason for the decision. Since the Board chose to credit evidence that is so weak, in contrast with the evidence to the contrary, to avoid a remand, it needed to give persuasive reasons for its reliance on that particular testimony.

Sandula v. District of Columbia Police & Firefighters' Retirement & Relief Board, 979 A.2d 32 (D.C. 2009)

Employee's injury must have occurred on the employer's premises in order to be eligible for disability benefits.

A State employee working for the Division of Youth and Family Services, arrived at the parking lot designated for State employees where she was assigned to park. The parking lot was located a block from the building where she worked. As she exited her vehicle, she slipped and fell on ice. The Board determined that due to the injuries incurred in the fall, the employee was permanently and totally disabled from performing her regular and assigned duties, but did not qualify for accidental disability benefits. In order to be entitled to accidental disability retirement benefits, the disabling injuries must be sustained as a direct result of a traumatic event occurring during and as a result of the performance of duties. The Board determined that the employee did not meet this criterion as the employee was a block away from her place of employment when she fell, she had not yet completed her commute, and as a result, the fall had not occurred during and as a result of the performance of regular or assigned duties, and the employee appealed. The court stated that in order to be entitled to accidental disability benefits, the employee must meet the statutory requirement that her fall took place as a direct result of a traumatic event occurring during and as a result of the performance of regular or assigned duties. The statutory language at issue was designed to limit eligibility for accidental disability pensions to accidents that occur on premises owned or controlled by the employer. The court found that the employee had not reached her

employer's building, but still had another block to go. She was not at the premises where she worked when she fell. The court upheld the Board's application of the statute to the facts involving the employee's accident.

Cannella v. Board of Trustees, Public Employees' Retirement System, Not Reported in A.2d, 2009 WL 2176988 (N.J. Super. A.D. 2009)

Retirement system must pay benefits to a missing beneficiary until that person is declared deceased.

A teacher retired and selected a joint and survivor annuity and listed his wife as the beneficiary. Under this plan, the teacher would receive a retirement benefit for his lifetime, and upon his death, his wife would receive a benefit for her lifetime. The employee died in 1989, and his widow began receiving the surviving spouse's retirement benefits. The widow disappeared in 2001, and a Florida probate court appointed a guardian for her property. The guardian requested that the retirement system forward the retirement payments to him, but the retirement system withheld the payments. In 2006, the probate court declared the widow deceased. In 2007, the retirement system advised the guardian that the widow had been entitled to benefits in the amount of \$152,774.10 for years 2001 through 2006. Since these funds were not issued prior to the widow's death, the retirement system concluded that the widow's children were entitled to these funds as beneficiaries, instead of the widow's estate. The guardian filed a request for writ of mandamus to compel the retirement system to pay the widow's estate the retirement benefits it withheld during the time the widow was missing before being declared dead. The court found that the plain language of the statute dictates that the widow was alive as a matter of law until 2006, when she was declared deceased by the probate court. The court found that the retirement system acted in an unreasonable, arbitrary, and unconscionable manner by ignoring the plain language of the statute and withholding the retirement benefits from the widow's personal representative when she was entitled to them. The court granted the guardian's writ for mandamus and ordered the retirement system to pay the retirement benefits to the widow's estate.

State ex rel. Mager v. State Teachers Retirement System of Ohio, 915 N.E.2d 320 (Ohio 2009)

Firefighters do not enjoy a fundamental right to the pension benefits pursuant to an ordinary employment contract.

The Union and The City of Waterbury ("the City"), negotiated terms of a new collective bargaining agreement ("CBA"). In the CBA, the Union made substantial concessions: pension benefits now accrued at 2% instead of 2.5%, the new CBA required 25 years of service before receiving full benefits, instead of 20 years, and firefighters who retired after the effective date of the new CBA had to make contributions to their health care premiums, whereas previous CBAs provided medical care at no cost. In return for these concessions, the Union received a promise that none of its members would be laid off during the term of the agreement and also procured a \$4,000 lump sum payment to each firefighter over and above their normal salaries. A group of active firefighters and members of the Union claimed that the new CBA deprived them of benefits that vested under the previous CBA, which stated that each employee shall vest in his pension after ten years of service regardless of the reason for termination of employment. All of the firefighters reached ten years of service either under the previous CBA or in the interim between the expiration of that agreement and the ratification of the new CBA. The firefighters claimed that the denial of allegedly vested benefits violated the substantive component of the due process clause of the U.S. Constitution. The court granted the City's motion for summary judgment and the firefighters appealed. In order to sustain a substantive due process claim, a plaintiff must demonstrate that he was deprived of a fundamental constitutional right by government action that is arbitrary or that shocks the conscience. The firefighters argued that they enjoy a fundamental right to the specific pension benefits enumerated in the old CBA. They contend that, because they have "risked their lives in service of the public good," the pension benefits they expected to receive under that agreement were "fundamental in our society's understanding of the proper order of things." However, the court found that it is well-established that substantive due process protections extend only to those interests that are implicit in the concept of ordered liberty, and rights so rooted in the traditions and conscience of our people as to be ranked as fundamental. Generally, interests related to employment are not protected. Simple, state-law contractual rights, without more, are not protected by substantive due process. The court concluded that the firefighters did not enjoy a fundamental right to the pension benefits they received pursuant to an ordinary employment contract.

Walker v. City of Waterbury, 2010 WL 114186 (2nd Cir. 2010)

Person who commits a felony that arises out of their conduct in connection with their duties forfeits all of their pension benefits.

In 1966, George H. Ryan was appointed to a county board of supervisors and served until 1972. While serving on the county board of supervisors, Ryan contributed to the Illinois Municipal Retirement Fund (IMRF). Ryan was elected as a representative to the General Assembly in 1972, served until 1982. Ryan was elected Lieutenant Governor in 1982 and served until he was elected Secretary of State in 1990. Ryan was elected Governor, and he served in that office from January 1999 until January 2003. When Ryan was first elected to the General Assembly in 1972, he became a member of the General Assembly Retirement System (the System). At that time, Ryan transferred the credits he had earned in the IMRF into the System. Ryan continued to participate in the System while serving as Lieutenant Governor, Secretary of State and Governor. In December 2002, Ryan applied for his retirement annuity, to begin in January 2003. In December 2003, a federal grand jury indicted Ryan on felony charges for racketeering, conspiracy, mail fraud, making false statements to the FBI, and income tax violations. These charges were premised on conduct that arose out of and was in connection with Ryan's service as Secretary of State and Governor. In April 2006, a jury found Ryan guilty on all counts. Following the felony convictions, Ryan was notified that all of his pension benefits were suspended due to the pension code section that provides that none of the benefits shall be paid to any person who is convicted of any felony relating to, or arising out of, or in connection with his or her service as a member, and Ryan he appealed. Ryan argued that the benefits he earned as county board supervisor, member of the General Assembly, and Lieutenant Governor were not subject to forfeiture. The court disagreed finding that the pension code plainly mandates that none of the benefits provided for under the System shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his or her service as a member. In other words, the court found that the forfeiture was total, and therefore, Ryan may not receive any benefits from the System.

Ryan v. Board of Trustees of General Assembly Retirement System, __ N.E.2d __, 2010 WL 572103 (Ill. 2010)

Oral representations are insufficient to establish a breach of fiduciary duty.

A group of employees worked for Credit Lyonnais Rouse ("Rouse"), which was absorbed by Credit Lyonnais ("Defendant Company") effective January 1, 2001. Before the merger, the employees met with their human resources director to discuss

the impact of the merger on their pension benefits. The new company represented to the employees that it would calculate vesting for pension benefits from the date the employees began working for the previous employer instead of the date they would begin working for the Defendant Company. The employees also contended that the company agreed to calculate pension funding from the date the employees began at the previous company, but the Defendant Company denied making these representations. The employees conceded that they have no written documents confirming their understanding of how their pension benefits would be calculated, and the record did not have any writing to that effect. Soon after the employees began working for the Defendant Company on January 1, 2001, all of the employees retired under the impression that pension benefits would be calculated according to their hire dates with the previous employer. After their retirement, the human resources director told one of the employees that his benefits would not be based on his start date with the previous employer, but instead based on the date he began working for the Defendant Company. The employees sued the Defendant Company alleging promissory estoppel and breach of fiduciary duty under ERISA on the grounds that the Defendant Company had represented that pension benefits would be funded as of the date the employees began working for the previous employer. The court found that oral promises are unenforceable under ERISA and therefore cannot vary the terms of an ERISA plan. The court further held that an oral statement purporting to alter the terms of a plan was insufficient to support a claim for promissory estoppel. Therefore, the court held in favor of the Defendant Company and dismissed the claims of promissory estoppel and breach of fiduciary duty.

Ladouceur et al. v. Credit Lyonnais et al., 584 F.3d 510 (2nd Cir. 2009)

Treasurer must perform his duties as directed by the Board of Trustees.

A board of trustees ordered the treasurer to pay certain amounts of retirement benefits to four retirees. Based on an audit by the Illinois Department (Department), the treasurer believed that the monthly pensions should have been lower. The audit concluded that the original pension determinations mistakenly included a \$6,000 retirement incentive and a clothing allowance in the beneficiaries salaries, which resulted in greater payments. The treasurer wrote a letter to the trustees, in which he pointed out the mistakes, and he recommended that the trustees change the benefits to comply with the audit. Upon receiving no response, the treasurer adjusted the payments to reflect the Division's audit. The trustees filed a complaint for mandamus against the treasurer, alleging that the treasurer had refused to pay retirement benefits as directed by the trustees. The court granted the trustees complaint ordering the treasurer to pay the original amount, and the treasurer appealed. Mandamus is used to compel an action that is purely ministerial where no exercise of discretion is involved. In this case, the court held that the trustees, not the treasurer, have the authority to administer the pension fund and to order pension

payments. The treasurer, in contrast, is only authorized to hold or pay out money following the direction of the trustees. Because the treasurer holds the money subject to the order and control of the Board, it is the treasurer's nondiscretionary duty to pay the pension amounts that the trustees authorized. Further, the trustees are entitled to have the treasurer pay as they direct because the Pension Code gives the trustees authority to order payments and gives the treasurer the nondiscretionary duty to pay as directed by the trustees. In this case, the trustees authorized the benefits based on the salaries as determined at the time of each beneficiary's retirement. Because the trustees have the authority to manage the fund and order payments and ordered payments based on the original salaries, they are entitled to have the treasurer pay that amount.

Morris v. Harper, 912 N.E. 2d 1288 (Ill. App. 5 Dist. 2009)

IRS Outlines Standards for Excess Benefit Arrangements

Over a period of three years, the IRS considered the request of a governmental retirement plan for guidance on its excess benefit plan. IRC Section 415(m) permits the establishment of excess benefit plans to pay benefits which otherwise would be lost due to maximum payment provisions of Section 415(b).

The city council of a participating municipality in a multi-employer system created by a state legislature established an excess benefit plan through city ordinance. The ordinance authorizes the Board of Administration of the retirement system to manage the excess benefit plan. The plan is set up as a separate trust and does not commingle assets with the retirement system. Assets are invested separately but are entirely paid out during the year. Any asset growth received during the year is used to pay the cost of administering the excess plan.

Excess benefits will not be paid unless the member is actually in receipt of a retirement benefit. (This gives rise to an unanswered question about DROP plans). Once the benefit paid no longer exceeds the 415(b) limit, the excess benefit will cease. There will be no employee contributions to the excess plan and it will not permit rollovers.

Under these facts the IRS approved the arrangement and also found that any income accrued would be exempt from taxation as a being derived from an essential governmental function under IRC Section 115s and 415(m)(1).

The unanswered questions from this PLR relate to those plans which have a deferred retirement option plan (DROP). DROP accumulations should not exceed 415(b) limits to the extent they accrue to the ultimate benefit of the member. Likely, the liability should be accrued as an account payable then deposited in the excess plan the first year the member begins distributions, even if the member rolls the DROP balance over to another qualified plan.

2009 PLR 200904033 2009 WL 155836

IRS Approves Deferral of Post Severance Compensation If Election Made Timely

The IRS was asked to consider a 457 Plan amendment in which deferred compensation could be made from compensation not yet paid, including post severance compensation paid within 2 ½ months after terminating employment. The election had to be made prior to the beginning of the month in which the compensation was to be paid or made available to the member. All deferrals were subject to the monetary limits (including catch-up provisions) of Section 457.

Given the above limitations, the IRS approved the plan amendment.

PLR 200940005, 2009 WL 3156497

IRS Addresses Questions Concerning Employer Paid Insurance

A state retirement plan which also provides post retirement health care payments asked the IRS whether the income to the trust is tax exempt and whether the plan needs to file a tax return. The plan provides benefits through self-insurance combined with commercial insurance. The employer pays a portion of the premium and the participants pay the rest.

The plan does not permit pre tax salary reduction elections. The plan also does not allow a cash-out of unpaid leave benefits or a conversion of used leave to retiree health benefits. (This has been something which the IRS has disapproved in recent years if it involved any election to take or not take the insurance. In addition, this is distinguished from annual leave cash-outs, which are permitted if the employee elects in one tax year to receive a cash out of leave from the succeeding year, and the pay out does not occur until the year after the leave accrues).

The plan also does not permit benefits to be paid to a nonmember who is not a spouse or who does not meet the definition of a dependent as defined by Section 152 of the IRC (essentially providing more than half of the person's income). If the plan ever ends up providing benefits to a non spouse or non dependent, the value of those benefits will be reported as taxable income to the member.

The plan is managed by a sole trustee who is Finance Director of the plan. The Trustee invests the assets of the trust and all income and contributions are held in trust for the sole benefit of the participants and beneficiaries and are used to defray the reasonable expenses of the trust.

The IRS determined that the payment of insurance benefits to active and retired employees is in furtherance of an essential governmental function and therefore exempt from taxation. The reason was two-fold. In Rev. Rul. 77-261, income from an investment fund established under a written trust declaration, to hold short term cash investments was exempt from taxation as the investment was for the purpose of furthering the business of government and not for the purpose of running a profitable investment fund as such. The IRS also held in Rev Rul 90-74 that risk pools created and maintained by government were tax exempt because they also furthered the business of government and did not materially benefit a non governmental entity or interest. As a result, it was unnecessary for the trust to file a tax return for the payment of exempt benefits under Section 106 of the IRC.

PLR 200918019, 2009 WL 1168258

In separate private letter rulings, the IRS reached the same conclusion for a special purpose district running a water and sewer authority (**PLR 2010 02023 2010 WL 147839**) and for a public utility owned by a municipality (**PLR 200946028 2009 WL 3794962**).

IRS Increases Scrutiny of State and Local Governmental Agencies

Within the last year, the IRS has considerably increased on site audits or examinations of state and local governmental agencies. The primary focus seems to have been in the area of public safety departments and has focused on the following:

Take Home Cars - Unless the car is a marked vehicle with lights and siren, the IRS has given increased scrutiny to plainclothes vehicles as non reported income unless the nature of the assignment is such that the use of an unmarked vehicles is

permitted. The adoption of a specific policy on the types of positions and the reasons for such vehicle assignments was adopted prior to any scrutiny.

Meal Reimbursement - Although there is no provision in the Internal Revenue Code or regulations on this issue, the IRS has taken the position through litigation that in order for a meal reimbursement to be non-reported as income, the employee must be away from the work site on assignment for more than 14 hours in a single day or there must be an overnight stay. This rule does not apply to meals provided. For example, if an actual meal is provided at the work site, rather than reimbursement for the cost of a meal, the meal is non reportable.

Cell Phone - The IRS has requested that employers be taxed on the value of the personal use of employer supplied cell phones. Since most governmental agencies (and most cell phone users) pay a flat rate regardless of usage, it is virtually impossible to parse the personal calls from the business ones. The IRS has generally seemed satisfied with the adoption of a cell phone policy that calls upon employees to limit cell phone usage of a personal nature to a minimum.

Employer-Provided Life Insurance - The IRS has been reviewing group life insurance which carries a benefit in excess of \$50,000. To the extent that a benefit exceeds this amount, the premium paid is reportable as taxable income.

Off-Duty Employment - Those agencies that provide for the hiring of employees for private, third party employment (generally off duty police or fire /paramedic work) have been receiving inquiries from the IRS concerning withholding and employer matching taxes. Specifically, the issue is who is the employer? If the employees receive pay directly from a third party employer, then an argument may be made that the third party employer is responsible for withholding and employment taxes. If the agency is receiving the money and paying the employers, it is likely the duty of the agency to report and pay any applicable taxes. This can be problematic in agencies with mixed practices, particularly when the agency is exempt from Social Security taxes. One solution is to add the potential cost of the employment tax to the off duty rate charged and have the agency be responsible for reporting. Alternatively, the agreement to provide services can require the purchaser to be responsible for the taxes and to indemnify the agency.

IRS Announces New FBAR Filing Requirements

The Financial Crimes Enforcement Network (FinCEN), a bureau of the Treasury Department, has issued proposed regulations under the Bank Secrecy

Act regarding reports of foreign financial accounts (FBARs). The proposed rule would clarify which persons will be required to file FBARs and which accounts will be reportable. While there has been no specific announcement, it should be noted that governmental entities and their employee retirement plans are specifically cited under the list of exceptions at page 8852:

"Governmental Entity. A foreign financial account of any governmental entity is not required to be reported on an FBAR by any person.

For purposes of this form, governmental entity includes: (1) a college or university that is an agency or instrumentality of, or owned or operated by, a governmental entity; and (2) ***an employee retirement or welfare benefit plan of a governmental entity.***" (Emphasis added)

The proposed rule can be found at Volume 75, Federal Register, No 38, page 8844, 8852.

IRS and SEC Announce Municipal Finance Task Force

The IRS and the SEC have announced the creation of a task force to scrutinize local government finance, particularly the accuracy of reporting of liabilities for employee benefits and the effect on the creditworthiness of the borrowing governmental entity.

A number of retirement plans have received inquiries from the SEC regarding the accuracy of their actuarial valuation as they relate to reporting of long term employer liability. The SEC has no regulatory authority over local government pensions. Similarly, municipal governments are exempt from SEC registration requirements. The SEC has, however, engaged in enforcement through the anti fraud provisions of section 17(a) of the Securities Act. For example:

- the City of San Diego, California failed to disclose the gravity of its enormous pension and retiree health liabilities or that those liabilities had placed the City in serious financial jeopardy [In the Matter of the City of San Diego, SEC Release No. 34-54745 (November 14, 2006)];
- the City of Miami, Florida failed to disclose an unprecedented cash flow shortage which it had eased, in part, by spending the proceeds of bonds issued for other purposes for operating costs [Opinion of the Commission *In the Matter of the City of Miami, Florida*, SEC Release No. 34-47552 (March 21, 2003)]

- Maricopa County, Arizona failed to disclose a material decline in its financial condition and operating cash flow, the substantial deficit in its general fund, and increased deficit in another fund [*In re Maricopa County*, SEC Release No. 33-7354, 34- 37779 (October 3, 1996)];
- the City of Syracuse, New York falsely claimed a surplus for its general and debt service funds, materially overstated its ending fund balances in those funds, and misled investors by describing certain financial information as audited [*In re City of Syracuse, New York, Warren D. Simpson, and Edward D. Polgreen*, SEC Release No. 34-39149 (September 30, 1997)];
- Orange County, California made misleading statements and failed to disclose material information about the County's high risk investment pool and financial condition that brought into question the County's ability to repay its securities – facts about which members of its Board of Supervisors were aware, but failed to take appropriate steps to assure were disclosed [*Report of Investigation in the Matter of County of Orange, California as it Relates to the Conduct of the Members of the Board of Supervisors*, SEC Release No. 34-36761 (January 24, 1996)];
- A lawyer serving as bond counsel was responsible for misrepresentations and omissions in an official statement and in his legal opinions, which failed to provide investors with full information concerning the substantial risk that the IRS would find a municipal securities issue to be taxable [*Weiss v. SEC*, 468 F.3d 849 (D.C.C. 2006) (upholding the Commission's decision *In the Matter of Ira Weiss*, SEC Release No.34- 52875 (December 2, 2005)]; and
- A group of 15 broker-dealer firms engaged in a variety of violative practices in the auction rate securities market and in certain other practices that were not adequately disclosed to investors in auction rate securities, some of which had the effect of favoring certain customers over others, and some of which had the effect of favoring the issuer of the securities over customers, or vice versa [*In the Matter of Bear, Stearns & Co. Inc.; Citigroup Global Markets, Inc.; Goldman, Sachs & Co.; J.P. Morgan Securities, Inc.; Lehman Brothers Inc.; Merrill Lynch, Pierce, Fenner & Smith Incorporated; Morgan Stanley & Co. Incorporated and Morgan Stanley DW Inc.; RBC Dain Rauscher Inc.; Banc of America Securities LLC; A.G. Edwards & Sons, Inc.; Morgan Keegan & Company, Inc.; Piper Jaffray & Co.; SunTrust Capital Markets Inc.; and Wachovia Capital Markets, LLC*, SEC Release No. 34-53888. (May 31, 2006)].

At present, the SEC, the IRS and various law enforcement agencies are investigating the City of Miami over reporting of its financial liabilities, including its pension liabilities as it relates to financial statements made to the market relating to bond sales.

Retirement plans should take care that actuarial liabilities being reported are included in the plan sponsor's CAFR, which in turn is used in the bond prospectus. While retirement plans don't issue bonds, they may be accused of being "aiders and abettors" if actuarial liabilities are knowingly reported inaccurately.

West Virginia Supreme Court Decision Affects Bankruptcy

A number of participants in the West Virginia Teachers' Retirement System took loans from their future benefits. Before the loans were repaid, the members declared bankruptcy. The members argued that their loans were "debts" which were discharged in bankruptcy and could not affect their retirement benefits. The Supreme Court of West Virginia agreed that the loans were not debts capable of being discharged in a Chapter 7 proceeding, but found that no interest on the loans could be collected.

The Court found that the loans were analogous to the issue faced by the New York City Retirement System in the case of *In re Villarie*, 648 F.2d 810 (2d Cir. 1981). The Court found, however, that by failing to appear in the Bankruptcy Court as the New York fund did in *Villarie*, the retirement system waived the right to collect compound interest on the loan. The lesson clearly is that retirement funds must act promptly on any bankruptcy petition and that loans from retirement accounts are clearly to be disfavored.

Clay v. Consolidated Public Retirement Board, ___ S.E.2d ___, 2010 WL 761215 (W.Va. 3/5/10)

City Which Declined to Hire Police Officer Beyond Mandatory Age Does Not Violate ADEA

An Oklahoma city declined to hire an individual as a police officer as he was older than the age limit adopted pursuant to the ADEA. The Oklahoma Police Retirement System refused membership on the same basis. The prospective employee sued the City and the retirement system alleging age discrimination. The employee had previously been an employee of a city which did not participate in the state police retirement system and thus, age was not an issue.

The officer claimed that the refusal to hire was because the retirement plan was a "subterfuge" to avoid the provision of the ADEA. As the age limitation in the plan was lawfully adopted pursuant to section 623(a) of the ADEA, it could not be a subterfuge and the city and the retirement plan were entitled to summary judgment.

Kannaday v. City of Kiowa, 590 F.3d 1161 (10th Cir.2010)

Federal Court Upholds DROP Against Age Challenge

A group of City of Ft. Lauderdale police officers claimed that the DROP program was age discriminatory as they were denied the value of increases in the length of the DROP bargained between the union and the City after they entered DROP. A U.S. District Court dismissed the claims finding that all of the officers, except one had signed ADEA waiver forms and that the DROP was essentially a voluntary early retirement program. The Court found as to all of the officers that any adverse effect was the result of retirement status and not age as approved in *EEOC v. Kentucky Retirement Systems*, 128 S.Ct. 2361 (2008). In other words, the City policy regarding DROP was not motivated by age. As a result, the decision in favor of the City and the retirement plan was affirmed.

Lerman v. City of Ft. Lauderdale, 346 Fed. App. 500 (11th Cir. 2009)

IF YOU HAVE ANY QUESTIONS OR COMMENTS CONCERNING THIS PRESENTATION, CONTACT ROBERT D. KLAUSNER, KLAUSNER & KAUFMAN, P.A., 10059 NW 1ST COURT, PLANTATION, FLORIDA 33324, (954) 916-1202, FAX (954) 916-1232, WEBSITE, www.robertdklausner.com.