

# LEGALINSIGHTS

FOR PENSION BOARDS

OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

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## First District issues more guidance in its third PSEBA opinion

by Meganne Britton

The criteria for awarding health insurance benefits under the Public Safety Employee Benefits Act (PSEBA) to line-of-duty disability pension recipients has become unclear after two different panels of justices on the Illinois Appellate Court for the First District reached different decisions concerning the meaning of “in response to an emergency” in two different cases involving the same fire protection district.

In *Gaffney v. Board of Trustees of the Orland Fire Protection District*, 397 Ill.App.3d 679 (1st Dist. 2009), the court held that a firefighter who was catastrophically injured during a live fire training event was not eligible for PSEBA benefits, although he was receiving line-of-duty disability benefits. In *Lemmenes v. Orland Fire Protection District*, 399 Ill.App.3d 644 (1st Dist. 2010), a second panel of judges held that a firefighter in a similar situation was eligible for PSEBA benefits. Both cases were appealed to the Illinois Supreme Court, which heard oral arguments on the cases on November 17, 2010.

Meanwhile, the First Appellate District has issued a third opinion on PSEBA benefit eligibility, and this time, its decision is focused on whether a pension board’s determination on “responding to an emergency” would bind the municipality’s decision on

awarding PSEBA benefits.

In *Oskroba v. the Village of Hoffman Estates*, \_\_\_ Ill.App.3d \_\_\_, 935 N.E.2d 596 (1st Dist. 2010), the court held that a firefighter who was receiving line-of-duty disability pension benefits after injuring his left shoulder while servicing a fire department vehicle was not eligible for PSEBA benefits because his injury did not occur in response to an emergency or what he could reasonably believe to be an emergency. Oskroba, a 37-year-veteran of the fire department, injured his shoulder when he was lifting a dry hose into a fire engine that had just returned from a fire. After applying for and receiving a line-of-duty disability pension from the pension board, he filed a request for PSEBA benefits with the Village of Hoffman Estates.

At the Village Board hearing, Oskroba introduced the pension board’s finding and decision which indicated that he was performing an act of duty and responding to an emergency relating to a fire when he was injured. In addition, Oskroba argued that he reasonably believed he was responding to an emergency because he thought the engine needed to be ready if another call came into the station. However, the station did not receive another call while he was servicing the engine that day.

## Deference on review of pension board decisions

by W. Anthony Andrews  
& Patrick J. Jesse

A recent appellate court decision affirms the deference courts accord to pension boards when reviewing their decisions. In *Kramarski v. The Board of Trustees of the Village of Orland Park Police Pension Fund*, 402 Ill.App.3d 1040 (1st Dist. 2010), the First District Appellate Court issued a decision affirming the Orland Park Police Pension Fund Board of Trustees’ decision to deny an officer’s application for either a line-of-duty disability pension or a non-duty disability pension.

Kramarski sought a line-of-duty disability pension after claiming she was unable to work due to alleged injuries she suffered during a training exercise. In October of 1996, Kramarski participated in a police baton training exercise with her sergeant and another officer. During the training exercise, the officer posed as the attacker while Kramarski defended herself with a foam training baton. According to Kramarski, the officer/attacker struck her in the face with his fists and feet, injuring her eye and nose and causing her head to snap back multiple times. That same evening, she did not report for her night shift, but phoned in sick, explaining she had not recovered from

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## First District issues more guidance in its third PSEBA opinion

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The hearing officer determined that Oskroba was not eligible for PSEBA benefits. Subsequently, Oskroba filed suit alleging the Village was barred from denying his claim by collateral estoppel because the pension board had already determined he was injured while responding to an emergency. The circuit court affirmed the Village Board's decision to deny PSEBA benefits.

Oskroba appealed arguing that the Village Board was barred by both collateral estoppel and waiver. He contended the Village Board waived its right to determine whether he was responding to an emergency by failing to intervene in

the pension board hearing. The appellate court held that the issue decided by the pension board was not identical and, thus, was not barred by collateral estoppel or waiver. The pension board decided whether Oskroba was injured during an act of duty, but it was not required to determine whether (1) he suffered a catastrophic injury; or (2) he was responding to an emergency.

Furthermore, the court noted that receiving a line-of-duty pension benefit is not an automatic qualification for benefits under PSEBA. While a catastrophic injury is equivalent to an injury that is categorized as a line-of-duty injury under

the Illinois Pension Code, there is no indication that awarding a line-of-duty disability pension negates the need for proof that the injury arose out of what was reasonably believed to be an emergency.

The *Oskroba* case confirms that the municipality or fire protection district -- not pension fund boards -- is responsible for processing and deciding requests for PSEBA benefits. Furthermore, entities reviewing requests for PSEBA benefits should decide whether the potential beneficiary suffered a catastrophic injury and was responding to an emergency before granting benefits. ■

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## Pension board decisions

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the training and had a shooting pain in her neck. Following that incident, Kramarski completed her training and became a sworn officer.

As a result of her alleged training injuries, Kramarski received medical treatment at several care centers. Subsequently, she filed a worker's compensation claim and eventually returned to work with a light duty restriction. Over the next three years, Kramarski underwent various examinations and procedures including, physical therapy, trigger point injections and cervical fusion surgery due to severe pain. In addition to treatment for her physical pain, she also received psychiatric counseling for post-traumatic stress disorder (PTSD) and depression due to the injuries she claimed to have sustained during the training exercise.

In January 2003, Kramarski filed an application for a line-of-duty disability pension and alternatively, a non-duty disability pension with the Board of

Trustees of the Orland Park Police Pension Fund ("Board"). During the hearings, Kramarski filed a motion to recuse two Board members she suspected of bias toward her. According to her, in a previous sexual harassment lawsuit which she filed against the Village of Orland Park, one Board member had been named as a defendant in the pleadings and the other Board member had been accused of allegedly creating a hostile work environment for her. Both Board members declined to recuse themselves.

The Board held four separate hearings due to the abundance of testimony and evidence. The Board heard testimony from the officer and sergeant, who participated in the baton training exercise during which Kramarski claimed to be injured. The officer denied Kramarski's allegations that he punched and kicked her in the face. The officer also testified that at the end of the exercise, he inquired if everyone was okay, and Kramarski indicated she was. Additionally, the sergeant testified that the officer

made only mild contact with Kramarski, and he did not see her injured or hear her report that she was injured immediately after the training exercise. A few days after the training exercise, the sergeant telephoned Kramarski as a "wellness" check, and he testified that she reported she was feeling "pretty good."

The Board considered medical reports received from three IME physicians who had evaluated Kramarski with regard to her alleged psychiatric disabilities. Two of the examining physicians concluded that Kramarski did not suffer from PTSD or depression; however, one of the physicians did conclude that she was psychologically disabled, despite his conclusion that she also had credibility problems. Additionally, the Board reviewed medical reports from three additional IME physicians who had examined Kramarski with regard to her alleged physical disability. Two of the three physicians concluded that she was physically disabled due to the cervical fusion surgery which limited her range of motion.

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## Change in PEDA and PSEBA benefits after Nowak decision

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by Meganne Britton

**I**n a case of first impression, on December 27, 2010, the First District Illinois Appellate Court held in *Nowak v. City of Country Club Hills*, \_\_\_ Ill.App.3d \_\_\_, 2010 WL 5487539 (1st Dist. 2010), that an employee who suffered a career ending injury was able to recover reimbursement for his health insurance benefits under Section 10(a) of the Public Safety Employee Benefits Act (PSEBA) (820 ILCS 320/10) from the date of his injury despite his receipt of benefits under the Public Employee Disability Act (PEDA) (5 ILCS 345/1).

In August of 2005, Officer Don Nowak was injured, and permanently disabled, while making an arrest. Officer Nowak was paid 100% of his salary for a year after the injury pursuant to PEDA; however, his healthcare premiums continued to be deducted from his salary. Before Nowak was awarded a line-of-duty disability pension in October 2008, he continued to pay his healthcare premiums. After Nowak was awarded the

disability pension, the City began paying 100% of his health care premiums.

Nowak filed suit against the City seeking reimbursement for his health care premiums, totaling about \$8,000, from the date of his injury up until his disability pension award. The circuit court ruled in favor of the City finding that PSEBA did not authorize the retroactive payment of health insurance premiums prior to the pension board's decision. Nowak appealed the circuit court's decision. The appellate court reversed the circuit court's decision finding that there was no time limit for collection or an explicit provision in PSEBA that prohibited the retroactive payment of premiums. The court determined that PSEBA benefits were not dependent upon or limited by other benefits afforded by PEDA or any other statute. Furthermore, the court held that benefits under PEDA Section 1(b) and PSEBA Section 10(a) could be granted simultaneously without offending the purpose of either statute.

Despite the City's argument that ruling in favor of Officer Nowak would create "obvious practical problems" and "obvious budget difficulties," the appellate court held that the City's interpretation of the statutes would run counter to the purpose of PSEBA. Instead, under the appellate court's decision, an employee who has suffered a career-ending injury is entitled to payment of his portion of health insurance premiums from the date of his injury, not from the time that the employee is found to be eligible for a disability pension.

At this time, it is unclear whether review by the Illinois Supreme Court will be sought by the City. If a petition is filed and granted, the appellate court's decision could be subject to review and possible reversal by the Illinois Supreme Court. Until that time, employers are advised to determine whether a line-of-duty injury is "catastrophic" soon after the injury occurs in order to establish if PSEBA insurance benefits will begin during the PEDA time period. ■

## Attorney Notes

■ **Donald L. Potts**, an associate in the Naperville office, has been called to active duty with the U.S. Army, beginning in November 2010. He has been assigned to the Pentagon in the International and Operational Law Division of the Office of the Judge Advocate General. Don is a Major in the Army Reserve and a member of the Judge Advocate General's Corps. This is Don's second mobilization, having served in Iraq in 2008-2009. Don is expected to return to OTTOSEN BRITZ in November 2011. The firm wishes Don the best during his leave and looks forward to his safe return next year.

■ **Carolyn Welch Clifford** has been invited to speak at the National Association of Public Pension Attorneys (NAPPA) Legal Education Conference to be held in June 2011, in Seattle, Washington.

■ **Karl R. Ottosen** was one of the presenters at the 26<sup>th</sup> Annual Chicago-Kent College of Law Illinois Public Sector Labor Relations Law Conference held on December 3, 2010 in Chicago. Karl was part of a four-member panel discussing "Military Leave & Reintegrating Returning Military into the Workplace."

■ **Shawn P. Flaherty** addressed the "Ethics and Gift Ban Act" and "Recent Pension Decisions of Interest" and **Ericka J. Thomas** discussed "Correcting Pension Board Mistakes" at two recent pension seminars held at the College of Lake County on October 15, 2010 and at Glenside Fire Protection District on November 12, 2010. Shawn assisted in designing the seminar program to aid pension fund trustees in meeting the new educational requirements established in August 2009, under the Illinois Pension Code. ■

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## Pension board decisions

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On November 1, 2007, the Board denied Kramarski's application for both a line-of-duty disability pension and a non-duty disability pension by a vote of 3 to 0. The two Board members who Kramarski sought to recuse were present during the hearings, but abstained from voting. In rendering its decision, the Board relied on the medical evaluations of the three physicians who had evaluated Kramarski's psychological disability. The Board did not give any weight to the opinions or conclusions of the physicians who based their conclusions on Kramarski's subjective complaints alone. Also, the Board found that Kramarski's testimony was not credible regarding her physical and psychological disabilities. Finally, the Board denied her application for a non-duty disability pension, concluding that her injuries were not a result of the baton training incident. Kramarski appealed the Board's decision.

On appeal, the trial court affirmed the Board's decision to deny her application for a line-of-duty disability pension. The trial court also concluded that Kramarski had received a fair and impartial hearing despite the presence of the challenged Board members during her hearings. However, the trial court reversed the Board's denial of a non-duty disability pension and awarded Kramarski a non-duty disability pension. Both the Board and Kramarski appealed the court's decision.

Kramarski presented three issues for the appellate court to decide. First, the court had to determine whether she was denied a fair and impartial hearing because the two challenged Board members were biased against her. In ruling on this issue, the court stated that a person claiming bias must demonstrate that the decision maker is not "capable of judging a particular controversy on the basis of its own circumstances." There is a presumption that decision makers are able to judge each particular case objectively and fairly. In its opinion, the court stated that Kramarski's only evidence of bias was the sexual harassment lawsuit against the Village, which was settled out of court. Therefore, the court concluded that she failed to provide sufficient evidence to show that the Board members were biased.

Secondly, the court had to determine whether the Board's decision to deny Kramarski's line-of-duty disability pension was against the manifest weight of the evidence. In reviewing the Board's decision, the court reasoned that if the record contained *some* evidence to support the Board's decision, then the decision should be affirmed. The term "manifest weight of evidence" is the standard employed by courts reviewing pension board decisions. According to the court, the testimony provided to the Board by the officer and the sergeant was sufficient to conclude that Kramar-

ski was not injured as a result of the training incident. Therefore, the court affirmed the Board's decision that Kramarski was not injured as a result of the training incident.

Third, the court had to determine if the denial of Kramarski's application for a non-duty disability pension was against the manifest weight of evidence. Under the manifest weight of evidence standard, the court concluded that sufficient evidence existed to support the Board's finding that Kramarski was neither psychologically nor physically disabled as a result of the training incident. The court noted that the Board has the authority to assess the credibility of witnesses and weigh the evidence presented. Again, the court concluded that if the record contains *some* evidence supporting the Board's decision, the reviewing court cannot overturn the Board's decision.

*Kramarski* provides an excellent example of the deference a reviewing court extends to a pension board's decision-making authority. Even though conflicting evidence was presented to the Board in *Kramarski*, the appellate court confirmed the Board's authority to render a decision. In short, reviewing courts will not reverse decisions rendered by a pension board, provided some evidence exists in the record to support that decision. ■

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