RESPONSE TIME

QUARTERLY NEWS FOR FIRST RESPONDERS

KARLSON GARZA LLC

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New Public Safety Legislation

This summer, Governor Rauner signed several pieces of legislation regarding public safety that became effective immediately upon signing.

P.A. 100-1097

At the end of August 2018, Articles 4 and 7 were amended. The amendment to Article 4 changed the manner by which annual examination of firefighters receiving disability benefits due to PTSD. Now, a firefighter disabled due to PTSD does ***not*** need to be annually examined if: 1) the firefighter is at least 45 years old; 2) the firefighter has provided the pension board documentation approving the discontinuance of annual medical exams from at least two physicians; and 3) at least four members of the pension board affirmatively vote to discontinue annual examinations.

PA 100-1097 also changed Article 7 (IMRF). The new law excludes any person who did not participate in IMRF prior to the effective date of the Act and participated as a chief of police in an Article 3 pension fund and returns to work in any capacity with the police department, with any oversight of the department, or in an advisory capacity for the police department with the same municipality. Meaning, police chiefs with no prior IMRF time will be excluded from joining IMRF if they have Article 3 time.

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HB 5231 does not make a FOID card mandatory to continued employment if police officers are seeking mental health treatment and have their FOID card suspended with the caveat that those who receive the suspension are not a danger to themselves or others. Now, police officers can seek mental health treatment with diminished fear of being fired.

House Bill 4855, was signed by Rauner, allows for a 60-day period after a FOID card has expired to remain active pending the renewal application was submitted on time. The bill also gives the Illinois State Police 60 business days to review and approve renewal applications that were submitted on time, alleviating a lot of stress surrounding renewal window time frames for both gun owners and ISP. HB 4855 also addresses hospital's mental health reporting procedures to help identify who should have their FOID card permanently revoked, or the new provision of having it temporarily suspended.

Old Discipline Records Not FOIA-able

Johnson v. Joliet Police Dept., 2018 IL App (3d) 170726
Maceo Johnson made a FOIA request to the Joliet Police Department. He requested any "disciplinary history" for a specified police officer. The department responded by saying, "we took this to mean discipline imposed from citizen complaints," of which they had none to turn over. The City also used Section 8 of the Personnel Record Review Act (PRRA) (820 ILCS 40/8 (West 2016)), which calls for employers to delete disciplinary records that are more than four years old prior to giving them to third parties.

Johnson responded by stating in a letter that the PRRA did not apply to FOIA requests and the City subsequently denied, again, holding the PRRA applied and the City had no records pertaining to Johnson's request from within the last four years. Unsatisfied, Johnson filed suit arguing the PRRA did not apply to FOIA requests. The Joliet Police Department filed a motion to dismiss on grounds PRRA prevented it from producing the documents. The circuit court granted the motion to dismiss. Johnson appealed.

The appellate court upheld the circuit court's decision. The appellate court made the decision by dissecting the relationship between FOIA and the PRRA. It explained, "specific language of FOIA, which references the [PRRA] by name, must take precedence over the general construction" of the PRRA. Meaning, personnel records longer than four years old are exempt from FOIA.

PTSD & Line Of Duty Disability

Covello v. Schaumburg FFPB, 2018 IL App (1st) 172350 In October of 2015, Steven Covello applied for a line-of-duty disability pension. Covello claimed his PTSD was caused by responding to a 2008 call where he knew the victim and could not save them.

Prior, during, and after this particular call Covello had been receiving treatment from a psychiatrist for "anxiety, depression, irritable bowel syndrome (IBS), gastroesophageal reflux disease (GERD), hoarding, stuttering, and obsessive compulsive disorder." The treatment began in 2007.

Throughout his career, Covello had numerous calls before this event that were both grisly and deadly. However, in the first five years of his treatment with the psychiatrist, Covello "did not express any work-related anxiety."

In January of 2013, Covello required treatment for a hernia. Treatment was delayed due to an infection and during that time Covello's FMLA time ran out. In June 2013, Covello's stuttering worsened. He sought medical treatment from

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another doctor who diagnosed him with PTSD at which point Covello filed for line-of-duty disability.

After hearing from six different doctors, the pension board denied Covello's line-of-duty benefit application because "it did not find a link between Covello's disability and an act of duty. However, the pension board granted a non-duty disability pension.

Covello sought administrative review. The Circuit Court affirmed the Board's decision. He then appealed. The appellate court affirmed all previous judgments.

The appellate court concluded Covello failed to meet his burden. It explained he had preexisting medical treatment for the various problems prior to the incident. There was sufficient evidence proving the incident did not act as a trigger for his disability. The record further demonstrated non-duty related stress aggravated his pre-existing conditions to the point of disability.

Firefighter Cancer Registry Act of 2018

Nationwide Firefighter Cancer Registry

On July 7, 2018, the Firefighter Cancer Registry Act of 2018 was signed into law. Under this Act, the CDC will create a nationwide registry of firefighters. The registry includes the number and type of fires a firefighter was exposed to. The voluntary registry aims to create a tracking method for cancer, a dangerous and common occupational hazard for those working in fire service. With this collection of data, the CDC can study the trends in an effort to find ways to reduce and avoid firefighter incidence of cancer.

KEITH A. KARLSON NAMED SUPER LAWYER ®

In September 2018, Karlson Garza LLC Partner Keith Karlson was named a Super Lawyer® in the areas of Labor and Employment Law. In order to be selected for this achievement, Keith was nominated by other attorneys. From there, his work history was researched and reviewed by a panel of his peers. Once selected, Keith became a member of an elite group of attorneys. Keith is incredibly honored to be selected as this distinction awarded to less than 5% of attorneys. However, he was disappointed to learn the distinction of Super Lawyer ® did not come with a cape.

Actuary Timothy W. Sharpe Suspended

In August 2018, once prolific Illinois Actuary, Timothy W. Sharpe, was suspended from the American Academy of Actuaries for a period of two years. Sharpe was suspended for failing to comply with to the Academy's Code of Professional Conduct in relation to work he contributed to police and fire pension in Illinois.

Sharpe's suspension is significant for several reasons. First, public discipline of an actuary is very rare, with only 21 suspensions or expulsions in the last 43 years. Second, after once being the most prolific actuary for Article 3 and 4 funds, Sharpe's suspension may continue to cause a decline in his business presence in Illinois.

Currently, Mr. Sharpe is being sued by at least one Illinois Article 3 pension fund.

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Peoria Hopes to Limit Benefits to Disabled Firefighters and Police Officers

The city of Peoria is attempting to re-define "catastrophic injury" for public safety employees. IAFF Local 50 challenged the ordinance first by filing a ULP and then following up with a lawsuit at the Peoria County Circuit Court. The lawsuit is expected to come before a judge in December.

Working After Social Security?

Rejoining the workforce after your start collecting Social Security could affect your benefits

At the outset, this article is intended to provide prospective retirees with questions for appropriately qualified professionals, not answers. Many retirees often return to the workforce for any number of reasons. However, going back to work after you've started collecting your SSA payments could have larger ramifications than expected.

For instance, if you begin taking your SSA benefits early, and return to work, there is a cap on how much money you can make before your benefits will be reduced. The income you can make before you face a reduction in benefits is dependent on the given year. In 2018, $1 will be deducted from your benefits for every $2 you earn making above $17,040 for a yearly income. If you reach full retirement age, there is no cap to what you can earn with your benefits being affected. Similarly, more income during retirement can impact on Medicare premiums on Part B (outpatient) and Part D (prescriptions).

The last piece of the puzzle to consider are required minimum distributions from retirement accounts, like 457's and 401k's. If you continue to work after retirement, you still have to the distributions from any individual retirement accounts you have outside of any you would be contributing into while working. If you don't, you could face punitive taxes.

In short, all would be well-served by consulting with a financial and/or tax professional prior to assuming early distribution of SSA benefits, or assuming post-retirement employment.

3 Times Not the Charm for Crystal Lake

Crystal Lake v. MAP Chapter 177 2018 IL App (2d) 170192-U

After losing at arbitration and in Circuit Court, the City of Crystal Lake continued to try to vacate the arbitration award reinstating a police officer back to work. Similarly, the appellate court agreed with the circuit court and arbitrator. The City could not demonstrate any public policy was violated by reinstating the officer. The City has now taken its fourth bite at the apple by seeking leave to appeal from the Illinois Supreme Court. At this point, the officer has been off work for multiple years and will be owed at least six-figures in back pay and lost benefits.

At the same time, the City has battled the police Union's FOIA request for the amount of money spent by the City in fighting its losing battle. That matter is also currently pending in court.

Nursing Mothers in the Workplace Act

In August, Illinois law further defined the Illinois Nursing Mothers in the Workplace Act. Originally, the bill lacked clarity on a "time frame" for mothers to nurse. Further, the law allowed employers to deny nursing if it "unduly disrupt[ed]" workflow. However, the amendment aligns now with the language of the Illinois Human Rights Act of "undue hardship" being the standard to deny a nursing break.

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New Light Duty Position Sufficient to Terminate Officer's Disability Pension

O'Donnell v. Policemen's Annuity & Benefit Fund of Chicago, 2018 IL App (1st) 171302-U No. 16 CH 12812

In 2006, O'Donnell fractured his right clavicle during his training at the police academy. For that injury, he was awarded a line of duty disability pension. In 2016, the Board conducted a hearing to determine O'Donnell's continued eligibility for benefits.

O'Donnell testified he lived with chronic pain due to his injury and used opioids to combat pain when it became too severe. He had been told surgery could help, but was nervous it would make the condition worse.

O'Donnell saw three doctors who all testified regarding his condition. While all of them noted he had healed, they also recognized he was not back to full capacity. Each of the doctors independently concluded, while he was unable to perform in the full capacity as a police officer, O'Donnell was capable of modified (light) duty.

The Board had director of HR at the Chicago Police Department testify regarding whether a light duty job was available for O'Donnell. O'Neill explained those jobs existed and "[t]he Department has routinely made reasonable accommodations, pursuant to the Americans with Disabilities Act (ADA)." However, because O'Donnell had not completed his training at the academy, he would either have to try to complete it before he was employed in a light duty capacity or he would remain a probationary police officer while working in that capacity.

The Board agreed O'Donnell could not return to full capacity as a police officer. However, the Board found he was able to return to light duty and discontinued his disability pension.

O'Donnell filed a complaint to prohibit the board from terminating his benefits during his appeal process. The circuit court granted his motion and ordered the Board to review new medical evidence. This new evidence consisted of communications between the Department's medical services section and HR, a physical exam, and a medical report by Dr. James Pride. The communications between the two departments regarded the physical exam that concluded O'Donnell could work in a limited capacity. The report from Dr. Pride similarly said the same with a new restriction - O'Donnell could no longer use his right arm/shoulder.

With this new information, the Board decided once again to terminate O'Donnell's benefits. In turn, the circuit court denied O'Donnell's petition.

Upon appeal, O'Donnell argued his benefits should not have been terminated because the Department had not in fact offered him a position that would fit his accessibility needs. However, because the steps to O'Donnell back into the workplace had begun, the appellate court felt that the Board's finding was still valid and a position was going to be available for him. The appellate court affirmed the decision of the circuit court and O'Donnell's benefits remain terminated.

Cumulative Injury Is PSEBA Eligible

Carney v. Lincolnshire-Riverwoods Fire Prot. Dist., 2018 IL App (2d) 170399-U

Firefighter James Carney was granted a line-of-duty disability pension after he successfully proved to his pension board that his pericardial mesothelioma was the direct result of his performance as a firefighter.

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After Carney received his pension, he began demands for payment of health insurance premiums by the Fire District under the Public Safety Employee Benefits Act (PSEBA). The District denied Carney's claim.

The District denied on the grounds there was no qualifying "catastrophic injury" to Carney. Carney argued because he was granted a line-of-duty disability pension, under those standards, the district had to pay his insurance premiums. In its first round in the courtroom, the circuit court ruled in favor of Carney. The District then appealed.

Because the case is governed by PSEBA, the appellate court sought to clarify if Carney met its terms of: (1) whether or not Carney suffered a "catastrophic injury" and (2) whether that injury resulted from Carney's "response to what was reasonably believed to be an emergency."

Citing multiple cases, the appellate court reaffirmed well-established black letter law. If an first responder is awarded a line of duty disability pension, they have met their first test under PSEBA.

For the second test of PSEBA, the appellate court turned to Carney's work history from the initial Board hearing. They found Carney's work history was filled with responses to what are known to be emergencies. Further, the appellate court explained, "the fact that one specific incident cannot be pinpointed as the 'emergency' that led to his disability is not relevant." Meaning, Carney's occupational disease is the culmination of multiple emergency responses and therefore meets the criteria of part two of PSEBA. Disabled Firefighter Carney was awarded PSEBA benefits.

FOIA Requests While In Jail

Bocock v. Will County Sheriff

Charles Bocock was a pre-trial detainee at the Will County Adult Detention Facility (WCADF) during 2015 and 2016. While a guest of the Will County Sheriff, Bocock made a series of FOIA requests WCADF denied. Bocock filed a series of complaints regarding his denied requests. The circuit court denied Bocock's complaints at which time he appealed.

The appellate court consolidated all of Bocock's appeals into one appeal. Bocock FOIA'ed the following items: (1) information regarding the milk served at WCADF on 3/2/15; (2) the lockdown schedule for March 2015; (3) documents regarding another inmate's stolen books and compensation for that loss ("Conway Documents"); (4) WCADF's policy manual; and (5) information regarding the sale of stamps after the price of stamps had dropped.

The milk information was considered moot by the appellate court because the physical container had all of the requested information that Bocock had asked for had been thrown away and was no longer in possession of WCADF. In regards to the lockdown schedule and the Conway documents, the trial court originally ruled they were exempt under FOIA. The lockdown schedule was partially exempt because it would put forth a security risk. In that complaint, the trial court ordered WCADF to disclose the time and dates of lockdowns but not durations and reasons for the lockdown. The appellate court upheld this ruling. The Conway documents were deemed exempt under FOIA because they sought exempt personal information. The appellate court also upheld that judgment.

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The policy manual judgment was also exempt under FOIA. The appellate court held it was exempt because the manual was not supplemented as evidence and therefore they could not determine if certain parts of the manual could be redacted and given to Bocock. Because of the lack of evidence, the appellant court had to affirm the trial court's judgment that it was exempt.

However, the appellate court reversed the initial judgment regarding the sale of stamps after the price of stamps dropped. The appellate court found such records existed because Bocock was able to produce his own receipt. Further, that WCADF knew the time and date for which Bocock was referring to in his request. Therefore, Bocock's request was not improper and should have been granted.

In short, detainees have the right to FOIA items. We will be shocked if this trend does not grow. Enjoy...

Shocking: Employer Wants to Change CBA Without Bargaining

CTA v. Amalgamated Transit Union Local 308

After an accident caused by exhaustion, the CTA implemented new changes to their scheduling in violation of the CBA. The ATU filed grievances and two seperate arbitrations occurred.

The first arbitration centered around rest time between shifts changing from eight hours to ten hours, mandating employees to pick 32 hours of motor runs per week, and limiting full-time employees who operate trains to 32 hours per week for the first 12 months. The arbitrator determined these were violations despite CTA's good intentions and ordered the CTA revert to the bargained for *status quo*. CTA asked the circuit court to set aside the award.

The second arbitration centered on limiting rail employees hours a day to 12 and not letting them work more than six consecutive days in a seven day period. The arbitrator again found the CTA violated the CBA. While these changes were made with safety in mind, they were violations of the CBA. Meaning, CTA had to negotiate over any changes. Once again, CTA filed with the court who confirmed the arbitrator's decision.

On appeal, CTA invoked the Illinois Public Labor Relations Act (IPLRA) to justify unilateral decisions in the name of safety. However, the appellate court found the CTA's argument unavailing. It held the IPLRA requires bargaining over changes, rather than forcing them without regard to the CBA.

CTA also attempted to argue that it had non-delegable power to change the schedule. It claimed such a question was not arbitrable. Again, the appellate court found Illinois law favored bargaining in situations regarding hours of work. The appellate court affirmed both arbitration awards.

Cook County Sued Over Property Taxes

Inflated property tax assessments under scrutiny

A group of property owners filed a federal complaint against the legality of Cook County property tax assessments as well as the state law governing the process. The property owners accuse the City of distorting assessments to create false market values. In turn, this impacts property value and inflated property taxes. The complaint reaches as far as ten years back for improper assessments and has highlighted how difficult the Illinois Property Tax Code is to navigate in appealing assessments and accountability.

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PSEBA Unlawful Act or Investigation of a Criminal Act?

Marquardt v. City of Des Plaines 2018 IL App (1st) 163186

In August of 2010, Officer John Marquardt sustained an injury to his left knee while inspecting a truck during a traffic stop of a semi-truck. Marquardt sought medical treatment and was diagnosed with tears in his meniscus and underwent surgery to address the issue. After his condition did not improve, he underwent a knee replacement. Marquardt sought and was granted a line-of-duty disability pension.

Marquardt proceeded to apply for PSEBA benefits. Des Plaines City Manager reviewed and subsequently denied his application. The City Manager did not believe Marquardt sustained his injury under the four circumstances PSEBA requires defines. Marquardt filed suit.

At trial, Marquardt argued he sustained his disabling injury "during the investigation of a criminal act." During the traffic stop, he had to climb the truck to investigate the load to complete his report that resulted in a traffic violation for being overweight according to Illinois law. The City conceded Marquardt was disabled. However, the City denied Marquardt climbing into a truck while on a traffic stop did not constitute the investigation of a criminal act. The circuit court sided with Marquardt. The court found Marquardt was entitled to PSEBA benefits because he was injured due to an unlawful act perpetrated by another, rather than the investigation of a criminal act. Because the driver only had to pay a fine for the citation, it then did not apply to the court's interpretation. The circuit court when on to define that, under the act, a criminal act had to result in a felony or misdemeanor that could be punishable by imprisonment. The City appealed.

The appellate court upheld the circuit court's interpretation of the Act in defining how Marquardt's injury was the result of an unlawful act. However, the appellate court disagreed with the circuit court's decision to define "as the result of" as proximate cause, introducing new language into an otherwise plainly defined statute.

If I Get It It's Longevity...

City of Countryside v. Countryside PPB

In the City of Countryside, the Police Department bargained with the FOP to have a longevity benefit in the form of an increase in pay for payroll period. This was done in an effort by the City to lower the cost annual salaries. The idea was, police officers would have their longevity benefit for the time being, but when the time came for retirement, their pensions would be higher. This was agreed to in a side letter, known as a "Letter of Understanding," negotiated by the Union and the City. The letter outlined a formula to calculate the pension benefit. In essence, when an officer took a longevity benefit, it would be added to his base salary and multiplied times 24 payroll periods, thus increasing his base salary for that year and raising his pensionable salary.

The City and the Union bargained over this letter and came to an agreement over it in 2002. In subsequent contracts, the longevity benefit was present but no additional information similar to the side note was. This lasted until 2009 when then City finance director sought to renege on the agreement. Nonetheless, the City's labor counsel agreed it was bargained over and agreed upon by the City and Union. The City's labor attorney opined the longevity enhancement was legal and pensionable salary.

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In 2010 the City's labor attorney sought clarity from the DOI regarding the side letter. The DOI found the longevity benefit should have been divided into equal monthly amounts for the purpose of determining the pensionable salary upon retirement. Shortly thereafter, the pension board attorney reached out to the DOI regarding the longevity benefit. Again the DOI brought up spreading the amount across equal payments. This time, however, the DOI also said the side letter was not legally binding and could not affect how pensions were determined. The City then hired its own actuary to determine its contribution amount. This actuary delineated from the side letter and determined a lower amount for contribution.

In 2012, the City filed a lawsuit against the Board and the FOP. Eventually, the City would name certain retirees as defendants. In the lawsuit, the City complained that "the computation method [was] unlawful," the Board "systematically miscalculated" contributions, that the "'pension spikes' [were] not pensionable," and that the City had never agreed to the use of the side letter.

In the meantime, the City and Union went into negotiations for 2010-2013 contract. The issue of the longevity benefit came under scrutiny and went into arbitration. The arbitrator found there had been a *quid pro quo* and the longevity benefit remained in the CBA.

In 2013, a portion of the complaint (counts IV and V) came to judgment and it was determined the CBA alone dictated the calculation for the longevity benefit and the side letter could not alter the CBA in anyway. In 2014, the retired defendants filed a counterclaim stating the City had breached its contract and violated legal obligations by not passing an appropriation ordinance regarding the side letter. The claim also requested the City be obligated to fund their pensions based on the side letter. The City moved to dismiss the counterclaim and it was granted in 2015 on grounds from the previous judgment the side letter had no bearing on pensions. The defendants appealed and again it was dismissed.

In 2016, the Board filed a counterclaim against the City regarding a lack of funding because the City did not take into consideration the benefits granted under the side letter. The retired defendants filed another counterclaim stating that the Illinois Constitution protected them from having their pensions altered. And, the City moved forward with the rest of their claims (counts I, II, III, and VIII). In the end, favor was granted to the City. The circuit court came to the following conclusions: the side letter was against the Pension Code and "municipal law," the City did not have to impose taxes or provide funding to the Board in regards to side letter calculations, the Board had to recalculate existing pensions and future pensions without the side letter, and the side letter was barred from use for future pensions. The Board and the retired defendants appealed.

The appellate court found that the circuit court was correct in its determination that the side letter was had no effect on the CBA, that the City was correct in using the DOI's suggestion to divide the longevity benefit payment equally across paychecks, and that the City did not need to levy a tax to pay for pensions because they could pay the pensions through other means outside of the tax. The appellate court also found the key issue in this matter came down to the fact the City used a different actuary that did not consider the side letter thus making the contribution smaller. The appellate court found the City's action justified.

The appellate court struck every defense the Board and the retirees put forth and affirming all decisions the circuit court made. Now, retirees benefits are being re-calculated and

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future longevity enhancements are expected to be calculated in the manner articulated by DOI. Why the retirees did not file a fraud claim against the City, like the retiree in *Barba v. Bensenville Fire Protection District*, will remain a questions. We are hopeful their counsel had a sound reason for adopting such a strategy.

January-March (1st Quarter) Agenda Items

- Semi-Annual Review of Closed Session Meeting Minutes
- Statements of Economic Interest
- Approve Annual Cost of Living Adjustments (COLAs) for Pensioners
- Review Trustee Term Expirations and Election Procedures

KG LLC News

- ➔ On September 20th, Karlson Garza LLC Partner Keith Karlson taught at the MAP Seminar regarding Officer involved shootings and critical incidents, and the impact of *Janus v. AFCME.*
- ➔ September 25th through 28th, Karlson Garza LLC Partner Keith Karlson attended the Labor Relations Information System Seminar regarding grievances and past practices.
- ➔ October 3rd through 5th, Karlson Garza LLC Partner Keith Karlson taught two classes at the Illinois Public Pension Fund Associations' Mid-American Pension Trustee training conference. Pensions and Collective Bargaining
- ➔ On October 10th, Karlson Garza LLC Partner Keith Karlson provided roll call training to officers for officer involved shootings and critical training.

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