RESPONSE TIME

QUARTERLY NEWS FOR FIRST RESPONDERS

KARLSON GARZA LLC

July 2018 Vol. 1 Iss. 1

Karlson Garza LLC Joins the Fight

Welcome aboard. On June 1, 2018, Karlson Garza LLC opened its doors. Founding partners, Keith A. Karlson and Raymond G. Garza were joined by associate Anthony R. Martin. Our office is located in Palos Heights, Illinois. Our clients are found across Illinois and Indiana. We hope you enjoy this first issue of our firm's quarterly newsletter.

Why do we do this?

Our firm primarily represents public safety professionals. We fight to win and preserve fair working conditions and wages for police officers and firefighters. Toward that same end, our firm is dedicated to preserving meaningful retirement security for first responders. Whether at the bargaining table, in the press, or in the legislature, benefits are under attack.

Public pensions and collective bargaining are not separate concepts. Both are under siege by the same powerful interests. These interests attempt to impose their will with a Wall Street money driven campaign aimed at the general public's ignorance and apathy. Now, more than ever, first responders require the protections they began fighting for more than a century ago. Unions and pensions are the best safety net for our public safety professionals.

Remember, these dangerous professions are uniquely different from other private sector dangerous occupations. For instance, most firefighters and police officers are not participating in Social Security. Even if they do participate, they receive a diminished benefit. Furthermore, pension funds do not only provide a retirement benefit, they provide for disabled first responders, and, in the case of death, survivor benefits for their children and/or spouse.

(708) 761-9030
kkarlson@karlsongarza.com

Our firm is dedicated to joining our first responder clients in the fight to protect their benefits. Pension Boards have a fiduciary obligation to their participants. They are required to administer their plans in compliance with applicable laws and regulations. Part of that obligation requires Pension Boards to retain competent professionals, including attorneys. Our firm provides a bevy of experience. That experience is fueled by a passion and informed by knowing we are on the right side of the battle. We are up to the task and will stand shoulder to should with you.

Last Chance Means Just That

AFSCME Council 31, AFL-CIO; and AFSCME Local 3477 v. Timothy C. Evans 2018 IL App (1st) 171217-U

Anthony Jordan was suspended from work in October of 2011 for poor performance. After the 30 days suspension, Jordan, his employer, and the Union signed a Last Chance Agreement ("LCA") stating "that '[a]ny singular recurrence of such non-compliance with department standards will result in' his termination." It also included a provision waiving rights to "grieve corrective action." All parties signed the LCA.

In 2014, Jordan was temporarily suspended by the Employer for not fulfilling work duties, and thus violating the LCA. The Union filed a grievance on Jordan's behalf, stating that "Employer failed to notify it and conducted an investigatory hearing of Jordan without it present." The matter moved through the grievance process.

In February 2015, the Employer terminated Jordan. The Union contested Jordan's termination and moved the grievance to the arbitration step. However, the Employer refused to arbitrate the matter because they believed the LCA waived Jordan's right to go to arbitration, thus making the matter not arbitrable.

The matter proceeded to litigation in trial court, where the court found the LCA "unclear" regarding whether it was a court's decision or an arbitrator's decision to determine if Jordan violated the LCA. The trial court referred the situation "to an arbitrator for a determination as to the dispute's arbitrability." The Employer appealed.

The Appellate Court held the Union does have in its Collective Bargaining Agreement a broad clause regarding arbitration and grievances. However, the LCA, considered a supplemental piece of the CBA, signed away Jordan's rights to arbitration based on previous performance issues. He had been given that as "one last chance." The LCA clearly stated, "any singular non-compliance with these conditions will cause his immediate termination from the department without the recourse of the collective bargaining grievance procedures."

The Union attempted to argue a new CBA was signed after the LCA was executed took precedence and rendered Jordan's LCA invalid. The Appellate Court held the LCA was still valid because the new CBA is meant to be broad and LCA's are specialized for individual employees. The Court reasoned, invalidating the LCA in favor of the broad CBA's "would render LCA's meaningless." The Appellate Court reversed the trial courts order because the discipline imposed did not fall within in the Arbitration clause.

(708) 761-9030
kkarlson@karlsongarza.com

"Public Entity" Under FOIA Further Defined

City of Danville v. Lisa Madigan and Kevin Flynn 2018 IL App (4th) 170182-U No. 4-17-0182

In December of 2014, the Housing Task Force met to identify housing issues in Danville. The team was comprised of eighteen community members and four City employees and used City resources to create and implement a five-year housing plan. The team had meetings and communications from December 2014 to July 2015, where on the 24th they submitted their final report to the city. On August 31, 2015, Kevin Flynn requested documents pursuant to the Illinois Freedom of Information Act (FOIA) regarding the Danville Housing Task Force and was subsequently denied. Flynn sought review with the Illinois Attorney General who then issued a binding opinion that Danville wrongly denied Flynn of the documents. The City then sought administrative review in the circuit court who subsequently affirmed the decision of the Attorney General. The City then appealed.

The City appealed, claiming the Housing Task Force was not a "public body." Likewise, the City claimed, the requested documents are not "public records" as defined by the Illinois Freedom of Information Act.

The Housing Task Force was tasked with objectives pertaining to "developing housing strategies specifically for the City." The City is clearly defined as a public body for FOIA purposes. According to documents relating to the Task Force's purpose, it was transacting public business. When referencing some of the Task Force's documents, the Court wrote, "This document expressly provides that the Housing Task Force's recommendations are intended to set forth the City's housing strategy for the 2015-20 planning period and guide the daily decisions of City officials. The City's housing strategies and the daily decisions of City officials in such matters clearly pertain to public or community interests—not private affairs." In addition to relating to the transaction of public business, the AG and the Appellate Court found the City was in possession of the records. Therefore, the Appellate Court held the documents were subject to disclosure under FOIA.

Retroactive Application of Divestiture of a License for a Prior Felony Conviction

Shakari v. Department of Financial and Professional Regulation 2018 IL App (1st) 170285

The appellate court upheld the Department of Financial and Professional Regulation's ("Department") decision to revoke Batu Shakari's RN license.

In 1975, at the age of 21, Batu Shakari was convicted of attempted murder. After completing his probation, he went on to pursue a career in nursing. He received his LPN in 1981 and his RN in 1989. In order to receive both of these licenses, he had to disclose his previous conviction. Both times the State nursing committee reviewed and approved him to move forward with the process. He renewed his license every year, until 2015, and was "never subject to disciplinary action" under either of his licenses during that time.

In 2011, the General Assembly passed a law (section 2105-165) stating in part:

(708) 761-9030
kkarlson@karlsongarza.com

> [w]hen a licensed health care worker *** (3) has been convicted of a forcible felony[,] *** the license of the health care worker shall by operation of law be permanently revoked without a hearing."

On July 31, 2012, the law became effective. After the passing of the law, but before its enforcement, the Department had already renewed Shakari's license for the term.

On August 17, 2015, the Department notified Shakari it "intended to permanently revoke" his license based on Section 2105-165. His license was then officially revoked on September 30, 2015.

Shakari filed a complaint for admin review in the Circuit Court claiming his conviction was before he became licensed and thus he was not covered by the law. However, the Circuit Court, concluded it did not matter when conviction occurred, only that it had in fact occurred.

Shakari appealed, again claiming the law did not apply to him and that since his license was renewed after the law was passed and enacted, "the Department was estopped from revoking his license." The Appellate Court affirmed the Circuit Court's decision to include those previously convicted of a forcible felony, regardless of when that conviction occurred.

The Appellate Court explained, "the revocation of certain health care workers' licenses 'by operation of law,' eliminated the Department's discretion to renew the licenses of such individuals. The Department's unauthorized renewal of Mr. Shakari's license after the law's effective date cannot give rise to a defense of collateral or equitable estoppel."

The Appellate Court found Shakari's due process argument unavailing. Shakari argued it is impermissible to retroactively punish a person for something occurring prior to the effective date of the law (i.e. *ex post facto*). The Appellate Court found Shakari's due process rights were not implicated because the law only impacted renewal of his license in the future. The Court reasoned that made the law prospective only.

Meet the Team:

MaryKate Hresil is the friendly and helpful person on the other end of the phone when you call our office. MaryKate comes from a southside family -- with many police officers and firefighters. She graduated (in 3 ½ years) from St. Joseph's College in 2015. She holds degrees in English - Creative Writing and Political Science. Prior to working at Karlson Garza LLC, she worked at a real estate brokerage firm handling national retail clients. In her free time, she can be found volunteering with the Rotaract Club of Chicago and reading towards her goal of 100 books this year.

Driving Around is Different from "Patrol"

Michael Hurd v. The Board of Trustees of the Maywood Police Pension Fund 2018 IL App (1st) 163368-U No. 1-16-3368

On July 28, 2010, Michael Hurd, a Maywood Police Officer, was on-duty, driving his squad car, and became injured in a traffic crash. The traffic crash caused Hurd to hit his elbow on the computer in his car and suffered from pain

in his elbow, back, and knee and his "whole basically right side." He finished his shift, went home, and sought medical treatment the following day. Since then, he has had four surgeries as a result of his injuries.

Hurd testified he complained of his injuries to his supervisors on the day of the crash. However, on cross examination, the supervisor he claimed to have reported to was not even on duty. The supervisor further testified she had no knowledge of Hurd reporting the injury. A different supervisor completed a vehicle crash report on the shift following Hurd's accident because "the reporting officer on plaintiff's shift did not complete it." Hurd was asked if he was in his assigned area at the time of his accident. Hurd testified, "I don't even remember what my area was at that time."

The Board denied Hurd's line-of-duty claim on the grounds he failed to prove he was engaged in any act of duty. Instead, the Board found he was simply "simply driving around, much like a taxi driver, delivery driver, or other civilian who is driving around town." Specifically, the Board found Hurd failed to prove he was on "patrol."

The Appellate Court held, "The record shows that there was no evidence that plaintiff was responding to a call, had engaged in an investigation before the accident, was heading to investigate a matter, or was driving in his assigned patrol area, as he could not remember 'what [his] area was at that time.'" Based upon the evidence before the Pension Board, the Pension Board's decision was upheld.

This case demonstrates the differing opinions regarding what constitutes "patrol" by our appellate courts. For instance, the Fifth Circuit's recent *Martin v. Shiloh PPB* decision seems to have conflated "on duty" with "line of duty." It is hard to reconcile cases like *Hurd*, *Fedorski*, and *Filskov*, with cases like *Martin.* Even cases favorable to applicants claiming they were disabled while engaging in "routine patrol," like *Rose* and *Jones*, required applicants to demonstrate they were engaged in "patrol." All of these cases, except *Martin*, seem to require the Applicant to prove they were not simply driving around. Instead, they had to demonstrate they were distracted or their equipment made their driving more dangerous than the rest of the motoring public. We will continue to monitor this area of law as the concept of "special risk" is further defined (or muddied) by the courts. One thing is clear though, the lack of clarity provided by the *Martin* court invites more litigation of this issue.

Beneficiary Must Pay Back Overpaid Benefits

Pete Almeida v Board of Trustees of the Elgin Police Pension Board, et al. 2018 IL App (2nd) 180129-U No. 2-18-0129

On April 16, 2018, the Second District Appellate Court issued an unpublished decision.

Police Officer Pete Almeida was granted a non-duty disability pension in 2009. Annually, Almeida submitted to mandatory medical exams to determine whether he continued to be disabled. On June 26, 2014, based on the exams, the Pension Board found he had recovered from his disability and terminated his disability pension.

On December 30, 2014, Almeida filed a complaint for administrative review of the decision and the court decided in favor of

(708) 761-9030
kkarlson@karlsongarza.com

Almeida and reversed the Board's decision. The trial court reversed the Pension Board's decision and concluded Almeida remained disabled. The Pension Board appealed.

On October 16, 2015 the decision made by the trial court was overturned. The Appellate Court found Almeida was no longer disabled. Therefore, Almeida was no longer eligible for a disability pension. Following the Appellate Court's affirmation of the Pension Board's decision, on November 17, 2017, Almeida was notified his disability pension from before had been overpaid by $57,625.74 and that they would reduce that amount from his retirement benefits.

In January of 2018, Almeida filed a complaint for breach of contract and preliminary injunction. The Circuit Court granted Almeida's request and enjoined the Pension Board from reducing his retirement benefits. The Appellate Court reversed the trial court. The Appellate Court held Section 3-144.2 of the Pension Code empowered the Fund recoup overpaid benefits by deducting the amount of the remaining benefits. Subsection (c) of Section 3-144.2 reads:

> If the benefit was mistakenly set too high, the Fund may recover the amount overpaid from the recipient thereof, either directly or by deducting such amount from the remaining benefits payable to the recipient as is indicated by the recipient. If the overpayment is recovered by deductions from the remaining benefits payable to the recipient, the monthly deduction shall not exceed 10% of the corrected monthly benefit unless otherwise indicated by the recipient.
>
> However, if (i) the amount of the benefit was mistakenly set too high, and (ii) the error was undiscovered for 3 years or longer, and (iii) the error was not the result of fraud committed by the affected participant or beneficiary, then upon discovery of the mistake the benefit shall be adjusted to the correct level, but the recipient of the benefit need not repay to the Fund the excess amounts received in error." 40 ILCS 5/3-144.2 (West 2016).

The requirements for a preliminary injunction, according to the Appellate Court, was not met because there 3 of the 4 requirements to justify an injunction were not met. The Appellate Court found there was: (1) no irreparable harm as he was not eligible to receive pension for eight years, (2) monetary damages were in fact a remedy at law for this case as it was a case about money, and (3) Almeida did not in fact have a good likelihood of success based on the pension code. In light of those findings, the Pension Board's decision stood. However, this battle may be waged again when Almeida reaches retirement age.

There are a variety of means by which the Pension Board could have avoided some of the consequences in this case. The Pension Board in this case was not represented by an IPPFA affiliated firm. It is always important to have skilled and experienced pension counsel. Again, this is an unpublished opinion – meaning, it cannot be cited as binding authority.

(708) 761-9030
kkarlson@karlsongarza.com

Actuary Timothy W. Sharpe Publicly Disciplined and Sued

Sharpe v American Academy of Actuaries Civil Action No. 2017-0258 (DC 2018)

At one time, Timothy W. Sharpe probably performed more actuarial studies for Article 3 and 4 Funds (or their related employers) than any other actuary in Illinois. It has been a rough couple of years for Mr. Sharpe. Bad press, at least one lawsuit, and public discipline by the American Academy of Actuaries may have played a role in the declining number of Illinois public pension funds using Mr. Sharpe's services.

In January 2018, following several internal procedural steps (e.g. hearings and appeals) the American Academy of Actuaries issued a "Notice of Public Discipline" regarding the actuarial practices of Mr. Sharpe. The Notice stated, "The Academy hereby publicly reprimands Mr. Sharpe for materially failing to comply with Precepts 1, 2, 3, and 4 of the *Code of Professional Conduct*."

Precept 1 requires an actuary to perform their work with competence. Precept 2 requires an actuary to only accept work they are qualified to undertake. Precept 3 requires an actuary to "satisfy the applicable standards of practice." Precept 4 requires an actuary to make certain communications and disclosures. The Academy found Sharpe violated each of the four precepts when he performed actuarial services for the City of Melrose Park. These services related to non-pension retirement benefits. A copy of the Public Notice can be obtained on the Public Discipline section of the Academy's website www.actuary.org. That site indicates only 32 actuaries have been publicly disciplined by the Academy.

Public concern over Mr. Sharpe's methods was featured in a, July 8, 2018, *New York Times* article entitled, "Bad Math and the Coming Pension Crisis." The article included concerns from an Illinois pension fund trustee who questioned whether Mr. Sharpe was using an outdated mortality table. Using an old mortality table may result in an artificially lowered levy for the municipality.

In addition to the public discipline and bad press, at some point, Mr. Sharpe filed suit against the Academy. Largely, he complained the allegations made against him should not have been made public. On January 12, 2018, a Federal Judge sitting in the D.C. District Court dismissed Sharpe's lawsuit for "failure to state a claim."

Sharpe is also currently being sued by at least one downstate police pension fund alleging actuarial malpractice. That matter is still pending in Illinois Circuit Court. It must be noted Sharpe has not been charged with any crime. Currently, Sharpe remains credentialed and is legally permitted to perform actuarial services. Pension Boards should closely scrutinize the qualifications of any professional services provider.

(708) 761-9030
kkarlson@karlsongarza.com

October-December (4th Quarter) Agenda Items

- Trustee Training Reimbursements *(if necessary for Fall Conference expenses)*
- IDOI Annual Statement (April Year Ends)
- Review/Approve - Actuarial Valuation and Tax Levy
- Review/Adopt - Municipal Compliance Report
- Establish 2019 Board Meeting Dates
- Annual Independent Medical Examinations

News

- ➔ On May 7th Keith Karlson taught Legal Aspects of the Use of Force for Indiana HIDTA in Hammond, Indiana.
- ➔ On June 1st Karlson Garza, LLC opened its doors.
- ➔ On July 29th Keith Karlson was invited to participate in the Pension Attorneys portion of the IPPFA National Roundtable.
- ➔ On September 29th Keith Karlson and Ray Garza will be speaking at the MAP Union Steward's Education Seminar.

Keith's July Craft Beer Recommendation: Surly Citra Pale Ale. It's hot. This low ABV pale ale is flavorful without the high octane of other craft beers. It's perfect for the summer months. Also, it can be found at most grocery stores.

12413 S. Harlem Ave
Suite 1SE
Palos Heights, IL 60463
(708) 761-9030
Fax (708) 716-4890

Follow at
@KGLaborLaw