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WHAT WERE THEY THINKING?



NOW WE FIND OUT!

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1. **Enhanced pension multiplier does not violate state constitutional balanced budget requirement or extra compensation prohibition.**

A county resolution adopted an agreement between a union and the county to an amendment to the existing memorandum of understanding in order to provide a higher pension multiplier. The agreement contemplated applying the enhanced multiplier to “all years of service,” including service prior to the date of the resolution. However, the county later decided that applying the increased multiplier to service prior to the enactment of the resolution “was unconstitutional at the time of its adoption and remains unconstitutional” The county filed suit against the pension board and the union seeking declaratory and injunctive relief. The county alleged that the resolution violated Article XVI, Section 18(a) of the California Constitution (the “balanced budget” requirement) “because without voter approval, the resolution created an immediately incurred and legally enforceable debt or liability or more than \$99 million, which exceeded the County’s available unappropriated funds for the year.” The county further alleged that the resolution violated Article XI, Section 10 of the California Constitution (the “extra compensation” clause), “which prohibits the payment of extra compensation to public employees, because the retroactive portion ‘grants extra compensation to public employees after service has been rendered.’” Regarding the balanced budget argument, the defendants argued that the liability associated with the increased multiplier does not constitute an “indebtedness” or “liability” within the meaning of the constitutional provision. Rather, the defendants argued that it is “an actuarial calculation of what the County’s obligations are likely to be in the future” Because unfunded pension liabilities are projections made by actuaries based upon many assumptions, rather than legally enforceable obligations, the court found that the resolution did not violate the constitutional balanced budget requirement. Citing California precedent, the court further concluded that the resolution does not provide unconstitutional extra compensation.

County of Orange v. Ass’n of Orange County Deputy Sheriffs, ___ Cal.Rptr.3d ___, 2011 WL 227711 (Cal. Ct. App. 2011)

2. **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)

3. **Reduction in amount of state-paid retiree health benefits found to not violate constitutional prohibition on impairment of contract.**

The state terminated a collective bargaining agreement pursuant to its termination clause and enacted legislation reducing the amount the state would spend on retiree health benefits. Labor union sued and argued that the state's actions violate the state and federal constitution impairment of contract clauses and takings clauses. The court ruled that there was no contractual relationship after the valid termination of the collective bargaining agreement and that there was no intent for the relevant provision of the agreement to survive termination of the agreement since the plain language of the agreement required an employee to take the affirmative step of retiring in order for the provision to apply. The court further held that in order for legislation to be considered contractual in nature, it must be completely unambiguous that the legislature intended for there to be a contractual obligation. The court determined that such unequivocal intention had not been shown. Therefore, the court ruled in favor of the state and determined that there was no unconstitutional impairment of contract. The court additionally held that there was no violation of the takings clauses because there was no property right in the impaired benefits.

Rhode Island Council 94 v. State of Rhode Island, 705 F. Supp.2d 165 (D. R.I. 2010)

4. **Union members do not have constitutionally-protected right to a particular level, manner, or method of state funding of pension system.**

A teachers' union filed a lawsuit against the state due to the state's failure to make appropriations for several years to fund the teachers' retirement system. Because state law requires the state to fund the pension system and the state failed to do so, the union argued that the state's failure to fund the system amounted to an unconstitutional impairment of contract. In rejecting the union's argument, the court held that union members do not have a constitutionally-protected right to a particular level, manner, or method of state funding of a pension system.

New Jersey Education Ass'n v. State of New Jersey, 989 A.2d 282 (N.J. Super. Ct. App. Div. 2010)

5. United States may garnish pension benefits in absence of state statute authorizing garnishment.

Two plan participants and the plan appealed the trial court's ruling that the United States may garnish the participants' pension benefits. The plan participants pleaded guilty to violations of federal laws and the trial court ordered the participants to pay restitution. The United States filed motions for writs of garnishment under the Federal Debt Collection Procedures Act (FDCPA) in an effort to seize the participants' retirement interests, and the district court issued writs of garnishment to the Louisiana Sheriffs Pension and Relief Fund (LSPRF). The appellants argued that the United States cannot legally garnish pension benefits pursuant to the Mandatory Victims Restitution Act (MVRA) because (1) Section 401(a)(13) of the Internal Revenue Code makes pension benefits inalienable; (2) forfeiture of the benefits is precluded by the Tenth Amendment to the United States Constitution; and (3) Louisiana constitutional and statutory law exempts pension benefits from garnishment. The court held that (1) "[n]otwithstanding any other Federal law" language in the MVRA overrides the anti-alienation provision of the Internal Revenue Code; (2) the garnishment does not violate the Tenth Amendment because it has no effect on state law, but rather penalizes violations of federal law; and (3) to the extent state law is inconsistent with the FDCPA and MVRA, state law is preempted. Finally, the LSPRF argued that it may be subject to liability for issuing a return of contributions without receipt of the statutorily required application. The court rejected the LSPRF's argument that it may be subject to double liability by reasoning that Section 3206 of the FDCPA insulates it from such liability.

United States of America v. DeCay, 620 F.3d 534 (5th Cir. Sep. 20, 2010)

6. Conviction for unauthorized access to a computer system found not to be a forfeitable offense.

A police officer's pension was forfeited as a result of the officer's conviction for unauthorized access to a computer system. While on duty, the officer created an account and password for 21 police officers in order to view the officers' civil service examination scores. The issue before the court was whether the officer's conviction was a forfeitable offense. The state's forfeiture statute mandates forfeiture "after final conviction of a criminal

offense involving violation of the laws applicable to his office or position” In holding that the officer’s conviction was not a forfeitable offense, the court reasoned that “accessing the computer system was not inherently in conflict with the role of a police officer as it is generally perceived by the public.” The court went on to state that “[u]nless this court were to find that any criminal conviction of a police officer requires pension forfeiture, which would appear to be inconsistent with legislative intent, [the officer’s] criminal conviction ought not result in the loss of his pension.”

Public Employee Retirement Administration Commission v. Bettencourt, 27 Mass.L.Rptr. 299, 2010 WL 3279672 (Mass.Super. 2010)

7. Board exceeded its authority in attempting to charge city for actuarial shortfall caused by program intended to be cost-neutral to city.

The City of San Diego established a program that allowed employees to purchase service credit in certain situations. It was undisputed by the parties that the program was intended to be cost-neutral to the city. After the board implemented the program, the city made retroactive benefit enhancements to the retirement plan, which effectively caused an increase in the value of prior service credit. However, the board failed to increase the cost of purchasing prior service credit. Several years later, in an effort to remedy the plan’s growing actuarial liability, the board voted to charge the city for the unfunded liability. The court ruled that because the legislation authorizing the program provided that it would be cost-neutral to the city, the board exceeded its authority when it voted to charge the city for the underfunding.

City of San Diego v. San Diego City Employees’ Retirement System, 111 Cal. Rptr. 3d 418 (Cal. Ct. App. 2010)

8. Courts should determine pension beneficiary based upon will’s clear intent.

A deceased employee’s will named his mother and brothers as beneficiaries of his residual estate. The employee’s will indicated that his son would be adequately provided for by several policies and accounts, specifically naming his pension. However, the employee designated his “estate” as the beneficiary of his pension. The trial court determined that the employee had

intended for his pension benefits to be distributed to his residual estate. In reversing the trial court's ruling, the appellate court determined that the plain language of the will indicated that the employee's intent was for his son to receive his pension benefits.

In re Estate of Prosser, 787 N.W.2d 479 (Iowa Ct. App. 2010)

9. 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 firefighters

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, 931 N.E.2d 256 (Ill. App. 4 Dist. 2010)

10. Cumulative effect of multiple injuries must be considered in disability determination and smoking is not a pre-existing condition.

An employee suffering from multiple lower back injuries as well as breathing problems filed for disability benefits. Disability benefits were denied by the board on the grounds that the employee failed to prove that he suffered from permanent physical or mental impairment that would prevent him from performing his job and because he failed to prove that his incapacity did not result from a condition pre-dating his membership in the retirement system. On appeal, the employee argued that it was an error for the hearing officer to fail to consider the cumulative effect of his multiple injuries. The court agreed and remanded the case to the trial court for a determination of whether the combined effects of the employee's impairments rendered him unable to perform his duties. The court also agreed with the employee's argument that it was improper to deny disability benefits on the ground that the employee's smoking was a pre-existing condition.

West v. Kentucky Retirement Systems, ___ S.W.3d ___, 2010 WL 2133844 (Ky. Ct. App. 2010)

11. State Board of Administration not liable for investment losses during waiting period.

Appellant voluntarily chose to participate in the Florida Retirement System's (FRS) self-directed investment plan account. Appellant understood that Section 121.591(1), Florida Statutes (2008), provides that participants in the Florida Retirement System (FRS) cannot withdraw their funds until three months after retirement. When he called the "MyFRS Financial Guidance Line" to inquire about distribution of the funds in his account, he was advised that participants are allowed to take a ten percent distribution after one month after retirement. By the time the participant requested distribution of his account, the account had lost over \$100,000 in value. The appellant claimed that the State Board of Administration (SBA) was liable to him for the losses, arguing that "the SBA concealed a material fact by failing to notify him that he still had the ability to reallocate his investment funds within the options available in the FRS Investment Plan during the three-month waiting period." The court acknowledged that Florida law follows ERISA in shielding plan fiduciaries from liability for losses experienced by participants in self-directed accounts, except when the fiduciary conceals a material non-public fact from participants. The court affirmed the SBA's refusal to reimburse the participant for his losses and found that there was substantial competent evidence that the SBA did not conceal a material non-public fact.

Burns v. State Board of Administration, 29 So. 3d 1205 (Fla. 1st DCA 2010)

12. Firefighter injured while servicing fire engine was not injured while responding to an emergency.

While servicing a fire engine, a firefighter seriously injured his shoulder. Under state law, a firefighter is entitled to full payment of his and his spouse's health insurance premiums by his employer if he suffers a catastrophic injury while responding to what is reasonably believed to be an emergency. The firefighter argued that he considered repairing the engine an emergency because the engine might be needed to respond to another call. The pension board awarded the firefighter a duty disability pension, but the employer determined that the firefighter was not injured while he was responding to an emergency and refused to pay health insurance premiums for the firefighter and his spouse. The firefighter argued that any firefighter who is injured in the

line of duty and receives a disability pension is entitled to insurance benefits. The court rejected this argument and held that a firefighter must show that he was injured while responding to what was reasonably believed to be an emergency in order to receive insurance benefits. Additionally, the court ruled that the employer's determination that the firefighter was not responding to what could reasonably be considered an emergency was not clearly erroneous.

Oskroba v. The Village of Hoffman Estates, 935 N.E.2d 596 (Ill. App. Ct. 2010)

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