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## 15<sup>TH</sup> ANNUAL CLIENT CONFERENCE

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### WHAT WERE THEY THINKING?



### NOW WE FIND OUT!

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**1. No vested right to benefit that was not properly enacted.**

In May, a California appellate court upheld the dismissal of a case which voided pension benefits which were not enacted in accordance with the City Charter. In 2002, the city council passed a resolution that “provided that the retirement benefit formula for each of the incumbent presidents of three unions that represent municipal employees would be based on each of those individual's highest one-year combined salaries from their city employment and their union employment, not to exceed the annual base salary of City's labor relations manager (the Incumbent President Program).” Several years later, the IRS issued a compliance statement, finding that the city council resolution failed to comply with section 401(a) of the Internal Revenue Code. “Specifically, the IRS Compliance Statement stated: ‘[T]he terms of the [SDCERS] provided special retirement benefits to past and current union presidents ... that were not permitted by the [Internal Revenue] Code. Under [Internal Revenue Code] section 401(a), retirement benefits in a qualified plan can only be provided to employees of an employer and such benefits are generally based solely on service with and compensation paid by such employer. Specifically, the following problems were noted: . . . Starting in 2002, the Incumbent President Program allowed compensation that was paid to the union presidents by the Unions to be counted in the determination of retirement benefits under the [SDCERS], and such amounts would be combined with any other compensation paid by the [City] subject to a specified dollar cap.’” After the IRS issued its compliance statement, the city council passed an ordinance to retroactively terminate the program and provided that “a union president’s base compensation for purposes of retirement benefits ‘will not include any amount paid by the labor organization.’”

Additionally, the same city council adopted an ordinance specifying that union members “will be allowed to convert annual leave cash equivalent to retirement service credit on a pre-tax basis.” The ordinance contained a provision that stated that if any part of this law is in conflict with federal or state law, that provision is invalid. This provision was also found by the IRS to violate Section 401(a) of the Internal Revenue Code. As a result, the city council adopted corrective legislation.

Upon judicial review, the court ruled that because the benefits were not properly enacted or did not comply with IRS provisions, they did not create

any contract rights and retroactive invalidation of the benefit did not violate the constitutional rights of participants, nor did it create a grounds for estoppel and detrimental reliance.

**San Diego City Firefighters Local 145 v. Board of Administration, 141 Cal. Rptr. 3d 860 (Cal. App. 2012)**

2. **Retirement benefit increase violated Northern Mariana Islands Constitution.**

A provision of Northern Mariana Islands law was enacted in 1989 to provide certain high-ranking government employees with a retirement bonus of an “additional three percent times average annual salary times years of service.” This bonus was repealed in 2003. A public employee retired in 2009 and did not receive the bonus, even though a portion of his service took place while the bonus was in effect. The Supreme Court of the Commonwealth of the Northern Mariana Islands held that the bonus violates a Northern Mariana Islands constitutional provision that a “member of the Legislature ‘may not debate on or vote on’ a bill in which the member has a financial or personal interest.” Because the bonus applied to legislators, the court held that it was unconstitutionally enacted. However, the court found that because “the Fund and members of the Fund acted in good faith when they respectively distributed and received funds pursuant to an unconstitutional statute[,]” and members who had already received the bonus are entitled to retain it.

**Bd. of Trustees of the Northern Mariana Islands Retirement Fund v. Ada, 2012 MP 10, 2012 WL 3779318 (N. Mar. I. Aug. 30, 2012)**

3. **Denial of survivor benefits proper when application was not timely filed.**

The widow of a public employee contacted the pension fund shortly after the member’s death requesting information regarding benefits. The pension fund sent the widow the application for survivor benefits, but did not inform her that there was a one year deadline to apply for the benefits. After the widow failed to submit her application within one year of her spouse’s death, her claim for benefits was denied. The widow sued, claiming a host of constitutional violations. However, the court agreed with the pension fund that the widow was precluding from receiving any survivor benefit due to her failure to timely file an application. The court concluded that “her right to survivor benefits was

governed by the terms of the Act and it terminated when she failed to comply with the Act's application requirements within one year of her husband's death."

**Martinez v. Public Employees Retirement Ass'n of New Mexico, 286 P.3d 613 (N.M. Ct. App. 2012)**

4. **Statute in effect at time of disability retirement application controls over statute in effect at time decision is made.**

A public employee applied for disability retirement benefits from a transportation authority, while still intending to maintain his position as township mayor. A statute that allowed a public employee to retire from one public employment position while retaining an elected office was repealed several months after the employee filed his application for disability retirement. However, the pension fund board applied the law in effect at the time of its consideration of the employee's application and determined that it was unable to consider the employee's application unless he resigned his position as township mayor. The employee challenged the pension board's refusal to consider his application unless he resigned as mayor. The court determined that the board should have applied the law in effect at the time the employee's application for benefits was filed. Ultimately, the court ruled that the board's refusal to consider the employee's application for disability retirement was erroneous and that the application must be considered by the board.

**Chiarello v. Bd. of Trustees, Public Employees Retirement System, 57 A.3d 567 (N.J. Ct. App. 2012)**

5. **Public employee's beneficiary designation made through his attorney held invalid.**

A deceased public employee's adult children brought an action against the pension fund and the employee's girlfriend, challenging the girlfriend's receipt of survivor benefits. The employee's girlfriend was listed as the employee's beneficiary on his beneficiary designation form. However, the form was not personally completed by the employee. Rather his attorney, acting without a written power of attorney, submitted the form on the member's behalf. The court ruled that the only exceptions to a member filing his own beneficiary

designation is where there is a court-appointed guardian or a written power of attorney. Because there was no court-appointed guardian or written power of attorney in this case, the court determined that the employee's girlfriend could not legally receive the benefits.

**Farmer v. Berry, 981 N.E.2d 929 (Ohio Ct. App. 2012)**

6. **Although there is a heavy burden, a longstanding course of conduct may possibly establish an implied contract.**

After a county passed a resolution that limits the amount of money that could be spent on retiree healthcare, an association representing the retirees filed suit. The association alleged various causes of action, including breach of express and implied contract. The association argued that the county's course of conduct over many years created an implied contract. Because the association was unable to identify any resolutions or ordinances that created a contractual relationship, the trial court dismissed the association's claims, with leave to amend. The association proceeded to file an amended complaint, which attached copies of numerous resolutions, memoranda of understanding, and ordinances upon which it relied. However, the trial court determined that none of these documents contained the county's express agreement not to reduce retiree healthcare benefits and dismissed the case with prejudice. On appeal, the court ruled that the association should have been given another chance to amend its complaint. In so holding, the court recognized recent judicial decisions holding that "a court can infer contractual rights from legislation when the legislature's intent is clear . . . ." In light of recent jurisprudence allowing a court to infer contractual rights from legislation, the court ruled that the association should have been given another opportunity to amend its complaint. However, the court noted that "a plaintiff claiming the existence of a contract with implied terms carries the heavy burden of establishing, from statutory language or relevant circumstances, that the public entity intended to create a compensation contract by ordinance or resolution. It also bears the equally heavy burden of establishing that implied terms in that contract provide vested healthcare benefits."

**Sonoma County Ass'n of Retired Employees v. Sonoma County, \_\_\_ F.3d \_\_\_, 2013 WL 690839 (9<sup>th</sup> Cir. Feb. 25, 2013)**

7. **Conviction for possession of child pornography on work computer is valid grounds for pension forfeiture.**

After pleading no contest to multiple counts of possession of child pornography, a pension board voted to forfeit a public employee's pension benefits. The employee appealed the forfeiture, arguing that his crimes were not connected to his employment. The court noted that under Florida law, in addition to certain specified forfeitable offenses, there is a "catch-all" of criteria that lead to pension forfeiture. "In order to constitute a 'specified offense' under [Florida law], the criminal acts must be: (a) a felony; (b) committed by a public employee; (c) done willfully and with intent to defraud the public or the employee's public employer of the right to receive the faithful performance of the employee's duty; (d) done to obtain a profit, gain or advantage for the employee or some other person; and (e) done through the use or attempted use of the power, rights, privileges, duties, or position of [the employee's] employment." The court found that by viewing pornographic materials on his work computer, there was "competent, substantial evidence in the record to support the [administrative law judge's] conclusion that [the employee] committed the felony of possession of child pornography willfully and with intent to defraud the public of the right to receive the faithful performance of his duties . . . ." The employee also argued that "the evidence failed to show that he realized or obtained a profit, gain, or advantage for himself or some other person." The court, however, rejected that argument and found that economic gain is not necessarily required in order to show that the employee obtained a personal gain. In this case, the court ruled that the employee's own personal sexual gratification constitutes a personal gain sufficient to permit pension forfeiture.

**Bollone v. Dep't of Management Services, Div. of Retirement, 100 So. 3d 1276 (Fla. 1<sup>st</sup> DCA 2012)**

8. **Payments to retired firefighters based upon salaries of active firefighters are subject to reduction when active firefighter salaries are reduced.**

A group of retired firefighters were receiving disability benefits for line-of-duty injuries. Pursuant to local law, the city was required to pay the firefighters "the difference between such benefits and their 'regular salary and wages.'" During the course of their retirement, the city and union entered into a new collective bargaining agreement, which included a 5% salary reduction

applicable to “all ‘bargaining unit members,’ except as otherwise ‘required by law.’” After the collective bargaining agreement was ratified, the city notified the firefighters receiving disability benefits that their benefits would be reduced accordingly. The firefighters filed suit, arguing that they are not “bargaining unit members” within the meaning of the collective bargaining agreement and that they have a vested interest in the higher salaries which cannot be reduced. The city argued that the retirees would receive the benefit of any salary increases and therefore must be subject to any salary reductions.

Noting that this was a case of first impression, the court ruled that because the payments owed to the retired firefighters is directly tied to the salaries of active firefighters, the retirees are subject to any reduction in salary paid to active firefighters.

**Whitted v. City of Newburgh, \_\_\_ N.Y.S.2d \_\_\_, 2013 WL 387918 (N.Y. App. Div. Jan. 4, 2013)**

**9. Division of retirement benefits should be calculated by using pay grade at the time of retirement**

A retired military officer was married to his former spouse for approximately ten years while he was serving in the military, and accruing applicable pension benefits. At the time of the divorce, the trial court awarded the ex-spouse one-half of ten years’ worth of the officer’s pension benefits. However, because the officer had not yet vested, the trial court did not determine the specific amount owed to the ex-spouse. One issue on appeal was whether the officer’s pay grade at the time of the divorce, or at the time of his retirement, should be used in calculating his ex-wife’s benefit. The officer argued that “using his pay grade at the time of retirement allows [his ex-wife] to unjustly reap the benefits of rank advancements that he achieved – without her help – after the parties’ divorce.” On the other hand, the ex-wife took the position that the officer’s service during the course of their marriage established the foundation for future promotions and that she should receive her share based upon the officer’s pay grade at the time of his retirement. The court agreed with the ex-wife and ruled that her share of the benefit should be determined by using the officer’s pay grade at the time of his retirement. The parties also disagreed over whether the percentage of the benefit the ex-wife is entitled to receive should be applied before or after taxes. Ultimately, the court held that the ex-wife’s portion of the benefit must be calculated after deducting taxes owed.

**Johnson v. Johnson, 270 P.3d 556 (Utah Ct. App. 2012)**

**10. Pension Fund bears the burden of demonstrating that disability presumption does not apply to September 11th responder.**

A police officer who responded to the World Trade Center to provide assistance following the September 11th terrorist attacks later developed a respiratory disability. The officer had worked 75 hours over 5 days between September 11 and 27, 2001. A triage form filled out on September 15, 2001 showed that she was coughing and complained of rib pain. The officer applied for disability retirement in February, 2002, which was denied. The officer then appealed the denial of the disability retirement. The court noted that normally the claiming filing for disability retirement bears the burden of proving causation. However, an applicable ordinance creates a presumption in favor of disability retirement for police officers who performed duties at specified locations, including the World Trade Center immediately following the September 11th terrorist attacks. The court noted that “[a]lthough the WTC presumption is not a per se rule mandating enhanced accidental disability retirement benefits for first responders in all cases, the Pension Fund bears the initial burden of coming forward with affirmative evidence to disprove causation.” Thus, while a disability applicant ordinarily bears the burden of establishing causation between a disability and his job duties, in the case of September 11th responders, the Pension Fund bears the burden of demonstrating that the disability was not caused in the line of duty. The pension fund had initially denied the disability by relying on a medical opinion that her medical condition was not related to the 9/11 exposure. The court ruled that there was no credible evidence in the record to deny the disability.

**McAuley v. Kelly, \_\_\_ N.Y.S.2d \_\_\_, 2013 WL 536887 (N.Y. App. Div. Feb. 14, 2013)**

**IF YOU HAVE ANY QUESTIONS OR COMMENTS CONCERNING THIS PRESENTATION, CONTACT KLAUSNER, KAUFMAN, JENSEN & LEVINSON, 10059 NW 1<sup>ST</sup> COURT, PLANTATION, FLORIDA 33324, (954) 916-1202, FAX (954) 916-1232, WEBSITE, [www.robertdklausner.com](http://www.robertdklausner.com).**