

**2022 CONFERENCE
NORTHERN ILLINOIS ALLIANCE OF FIRE PROTECTION DISTRICTS
SATURDAY, JANUARY 22, 2022**

DISABILITY PENSION INTERVENTION: A THREE-ANGLED VIEW

JAMES G. WARGO

OTTOSEN DINOLFO HASENBALG & CASTALDO, LTD.

1804 N. NAPER BLVD., SUITE 350

NAPERVILLE, ILLINOIS 60563

(630) 682-0085/JWARGO@OTTOSENLAW.COM



INTRODUCTION

Pension funds are increasingly seeing intervention petitioners from their fire protection districts.

Evolving topic before the courts, sometimes leaving more questions than answers.

This presentation will discuss why fire protection districts and municipalities intervene, the law governing intervention, and the practical ramifications associated with intervention

TOPICS



Factors motivating intervention



A pension board's discretion on intervention



Interests sufficient to support a municipality or fire protection district's request to intervene



Illustrative Cases



The Mechanics of Intervention



Commonly Cited Prejudices by Applicants



Limitations on Intervention and practical considerations



Conducting the hearing with an intervenor

A photograph of the San Francisco City Hall at dusk. The building is illuminated with warm white lights, highlighting its classical architecture, including a large central dome and a portico with columns. The sky is a clear, light blue. In the foreground, there are trees, streetlights, and a few cars parked on the street.

WHY DO FIRE PROTECTION DISTRICTS AND MUNICIPALITIES INTERVENE?

WHY DO FIRE PROTECTION DISTRICTS AND MUNICIPALITIES INTERVENE?

- Short answer: to defend their interests.
- Pre-2015: Intervention not as common.
- In 2015, the Illinois Supreme Court ruled in *Village of Vernon Hills v. Heelan*, that employers must make certain arguments relating to the Public Safety Employee Benefits Act before the pension fund. 2015 IL 118170.



THE PUBLIC SAFETY EMPLOYEE BENEFITS ACT (“PSEBA”)

- When a public safety employee suffers a “catastrophic injury” or is killed in the line of duty during certain emergency situations, the employer must pay “the entire premium of the employer’s health insurance plan for the injured employee, the injured employee’s spouse, and for each dependent child of the injured employee until the child reaches the age of majority or until the end of the calendar year in which the child reaches the age of 25 if the child continues to be dependent for support or the child is a full-time or part-time student and is dependent for support.” 820 ILCS 320/10.
- Expensive for municipalities.

THE PUBLIC SAFETY EMPLOYEE BENEFITS ACT (“PSEBA”)

PSEBA health insurance benefits are available to any full-time firefighter, law enforcement officer, and/or correctional officer who:

- Suffers a *catastrophic injury* or is *killed* in the line of duty. (820 ILCS 320/10(a))
- And such injury or death occurred as a result of:
 - The officer’s fresh pursuit;
 - The officer or firefighter’s response to what is reasonably believed to be
 - (i) an emergency;
 - (ii) an unlawful act perpetrated by another, or
 - (iii) during the investigation of a criminal act. (820 ILCS 320/10(b))

A PUBLIC SAFETY OFFICER MUST SATISFY BOTH PRONGS OF PSEBA TO BE ELIGIBLE FOR PSEBA BENEFITS:

1ST PRONG: Catastrophic injury or death in the line of duty

2ND PRONG : The death or injury occurred as a result of:

- (i) Officer's response to fresh pursuit;
- (ii) Officer or firefighter's *response to what is reasonably believed to be an emergency*;
- (iii) An unlawful act perpetrated by another; or
- (iv) Investigation of a criminal act.

THE PUBLIC SAFETY EMPLOYEE BENEFITS ACT (“PSEBA”)

- *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 400 (2003): Illinois Supreme Court held that a catastrophic injury is synonymous with an injury resulting in a line-of-duty disability pension.
- *Heelan*: If a municipality or fire protection district wants to challenge whether an employee suffered a “catastrophic injury,” it must do so before the pension board (*i.e.*, it must intervene).



**THE LAW GOVERNING
INTERVENTION**

A PENSION BOARD'S DISCRETION TO ALLOW INTERVENTION

- Fire protection districts and municipalities do not have an absolute right to intervene in a disability pension hearing. *Village of Stickney v. Board of Trustees of the Police Pension Fund of the Village of Stickney*, 347 Ill. App. 3d 845 (1st Dist. 2004).
- Instead, pension boards have discretion to allow such intervention.
 - This discretion stems from the board's fiduciary duty owed its participants and beneficiaries to properly screen disability claims. 40 ILCS 5/1-109.

LIMITS ON A PENSION BOARD'S DISCRETION

- Even though pension boards have discretion to allow intervention, it is not limitless.
- An intervention decision must not be “arbitrary or capricious,” which means it:
 - Contravenes the legislature’s intent,
 - Fails to consider a crucial aspect of the problem, or
 - Offers an explanation which is so implausible that it runs contrary to the board’s expertise.

INTERVENTION INTERESTS

- To properly intervene, a fire protection district or municipality must demonstrate that it has interests in the disability proceeding.
 - If it does not, the board can deny the request to intervene.
- Intervention interests:
 - Proper expenditure of public pension monies.
 - Potential impact on PSEBA interests.
 - Potential impact on workers' compensation case.
 - Submission of new evidence.

INTERVENTION INTERESTS

Proper expenditure of
public pension monies.

- An intervening fire protection district or municipality can automatically claim a generalized interest in the proper expenditure of pension money. *Williams v. Bd. of Trustees of Morton Grove Firefighters' Pension Fund*, 398 Ill. App. 3d 680, 689 (1st Dist. 2010).
- Idea: if the pension fund improperly spends money, it falls on the fire protection district or municipality to make up the difference.
- Insufficient to warrant intervention on its own. Fire protection district or municipality needs to show at least one more interest.

INTERVENTION INTERESTS

Potential Impact on PSEBA Interests

- When a public safety employee suffers a “catastrophic injury” in certain emergency situations, the employer must pay “the entire premium of the employer’s health insurance plan for the injured employee, the injured employee’s spouse, and for each dependent child of the injured employee until the child reaches the age of majority or until the end of the calendar year in which the child reaches the age of 25 if the child continues to be dependent for support or the child is a full-time or part-time student and is dependent for support.” 820 ILCS 320/10.
- Expensive for fire protection districts and municipalities. According to the [Illinois Commission on Government Forecasting and Accountability](#), the average recipient premium began at \$1,892 in reporting year 1997 and has increased to \$18,467 in reporting year 2019.

INTERVENTION INTERESTS

Potential Impact on PSEBA Interests

- The place for a fire protection district or municipality to challenge whether an employee suffered a “catastrophic injury” is before the pension fund. *Village of Vernon Hills v. Heelan*, 2015 IL 118170.
- “Catastrophic injury” under PSEBA and “line-of-duty disability” under Pension Code are synonyms. *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 400 (2003).
- If an employee receives a line-of-duty pension, the first element of PSEBA is met no matter what.
- Fire protection districts and municipalities therefore have an interest in being parties to the pension proceedings.

INTERVENTION INTERESTS

Potential impact on
workers' compensation
cases.

- A pension board's decision in a disability proceeding could also have an impact on the issues in a corresponding workers' compensation case.
- Workers' compensation cases involve a lesser causation standard – the injury must arise out of employment.
- Line-of-duty disability under the pension code is a higher standard.
- If the pension fund grants a line-of-duty application, workers' compensation is bound to find a compensable injury as well.

INTERVENTION INTERESTS

Submitting new evidence.

- If the fire protection district or municipality has important evidence to enter into the board's administrative record, it has an interest supporting intervention.
 - *Portincaso*: Municipality had a late-breaking workers' compensation decision that impacted the pension board's analysis. The pension board abused its discretion by disallowing intervention to the municipality.
- Commonly cited interest, but the most abused.

INTERVENTION INTERESTS

Submitting new evidence.



A fire protection district or municipality must do more than make a mere promise that it will someday help augment the record.



Instead, the caselaw suggests the fire protection district or municipality must *actually* have evidence the pension board does not.

INTERVENTION INTERESTS

Submitting new evidence
– cross examination of
applicant.

- A mere desire to cross-examine the applicant, without more, is insufficient. *City of Peoria v. Firefighters' Pension Fund of City of Peoria*, 2019 IL App (3d) 190069.
- This is because the pension fund may impose restrictions on cross-examination even if the fire protection district or municipality is permitted to intervene.





ILLUSTRATIVE CASES

ILLUSTRATIVE CASES

Williams v. Board of Trustees of the Morton Grove Firefighters' Pension Fund

- Village sought to intervene and asserted three bases:
 - Proper expenditure of pension funds;
 - PSEBA implications; and
 - Developing a full evidentiary record.
 - Would offer medical testimony, cross examine the witnesses, and obtain legible copies of certain documents to supplement the exhibits prepared by the board.
- Pension board allowed intervention, applicant appealed.
- Appellate court affirmed the pension board's decision.

ILLUSTRATIVE CASES

Coyne v. Milan Police Pension Board

- Village sought to intervene and asserted two bases:
 - Proper expenditure of pension funds; and
 - The applicant was the subject of a union grievance involving similar facts.
- Pension board allowed intervention.
 - The appellate court did not rule on the propriety of the intervention, as the issue was not presented to it.

ILLUSTRATIVE CASES

Village of Alsip v. Portincaso

- Village petitioned to intervene, offered three bases:
 - Generalized interest in proper expenditure of pension funds;
 - PSEBA implications; and
 - Desire to augment administrative record.
 - Village had acquired final workers' compensation decision that precluded the pension board from finding there was a line-of-duty injury.

ILLUSTRATIVE CASES

Village of Alsip v.
Portincaso

- Pension board *denied* intervention, reasoning that:
 - (1) the pension board was unable to hear evidence about the effect of the workers' compensation case because the appellate court decision was unpublished under Illinois Supreme Court Rule 23—even where it was offered for collateral estoppel purposes;
 - (2) the Village's interests under PSEBA would not be adversely affected by the proceedings (*but see Heelan*, 2015 IL 118170); and
 - (3) the Village's workers' compensation interests would not be adversely affected by the inability to plead collateral estoppel. *Portincaso*, 2017 IL App (1st) 153167, at ¶ 25.

ILLUSTRATIVE CASES

Village of Alsip v.
Portincaso

- The Appellate Court reversed the pension board's decision.
 - (1) the pension board **could** consider the unpublished case because it was offered for collateral estoppel purposes;
 - (2) the Village's interests under PSEBA **would** be adversely affected by the proceedings (see *Heelan*, 2015 IL 118170); and
 - (3) the Village's workers' compensation interests **would** be adversely affected by the inability to plead collateral estoppel.
- This reasoning was “arbitrary and capricious” because it was legally incorrect.

ILLUSTRATIVE CASES

Village of Alsip v.
Portincaso

- Does *Portincaso* stand for the proposition that any time a municipality or fire protection district offers a similar cocktail of interests, intervention must be granted?

ILLUSTRATIVE CASES

Village of Vernon Hills v.
Vernon Hills Police
Pension Fund (Briscoe)

- Rule 23 case – cannot be cited as precedent.
- Village petitioned to intervene, claimed four interests:
 - Generalized interest in ensuring proper expenditure of pension funds;
 - PSEBA implications;
 - Workers’ compensation implications; and
 - Augmenting the record.
 - Wanted to conduct an IME of the applicant at its expense and cross-examine the witnesses.

ILLUSTRATIVE CASES

Village of Vernon Hills v.
Vernon Hills Police
Pension Fund (Briscoe)

- Pension board denied intervention.
- Appellate court upheld pension board's decision.
- Appellate court emphasized “the question before us is not whether the Board could have acted within its discretion by allowing the Village to intervene, but rather whether it abused its discretion by denying the Village's petition to intervene.”
 - Question wasn't whether there was enough to sustain a grant of intervention.
 - Instead, the question was whether the pension board had discretion to say “no.”

ILLUSTRATIVE CASES

Village of Vernon Hills v.
Vernon Hills Police
Pension Fund (Briscoe)

- Pension board reasonably could have come to the conclusion that the Village's participation was not necessary.
- Pension board is not a rubber stamp, it has a fiduciary duty to conduct its own screening process.
- Pension board sends the applicant to three IME physicians of its own.
- Board issued an open-ended subpoena for records to the Village.
- Village was able to "thoroughly" argue the issue of the applicant's pensionable salary.
- The Village's tenor in its intervention petition was very adversarial, but pension hearings are not supposed to be adversarial.

ILLUSTRATIVE CASES

City of Peoria v. Firefighters' Pension Fund of City of Peoria

- Village wanted to intervene based on three interests:
 - Generalized interest in proper pension expenditures.
 - PSEBA implications; and
 - Developing the record.
- Pension board denied intervention.
 - Applicant was ineligible for PSEBA.
 - City conceded it did not actually have any additional evidence to present to the pension board.
 - A desire to cross examine witnesses is insufficient on its own, since the pension board could limit that even if the Village were allowed to intervene.

THE MECHANICS OF INTERVENTION



HOW DO FIRE PROTECTION DISTRICTS AND MUNICIPALITIES INTERVENE?

- The Petition to Intervene
 - Should be timely filed (*i.e.*, not too close to the hearing date)
 - Should explain the employer's intervention interests
 - Should comply with any rules set by the pension board

HOW DO FIRE PROTECTION DISTRICTS AND MUNICIPALITIES INTERVENE?

Additional briefing:

- The disability applicant is often given time to respond to the petition.
- The municipality or fire protection district is ordinarily given leave to reply to the applicant's response.

The intervention hearing

- Often, the pension board elects to hold a hearing on the intervention request.
- Usually involves hearing argument from both sides.

THE INTERVENTION DECISION

Factors to consider

- The pension board should consider:
 - Whether the fire protection district or municipality really has the intervention interests asserted.
 - The strength of the employer's interests.
 - Whether intervention would cause undue prejudice to the disability applicant.
 - Whether any such prejudice can be minimized.

COMMONLY CITED PREJUDICES BY APPLICANTS

Delay and Adversarial Proceedings

- “Intervention will cause delay”
 - Usually seen if the intervention petition is made later in the process.
 - Can be mitigated by the pension board imposing restrictions on how much time the fire protection district or municipality can have to get up to speed.
- “Intervention will turn the pension matter into an adversarial proceeding.”
 - It is true that pension disability proceedings are “non-partisan,” but that does not mean the pension board cannot allow intervention to help it in its fact-finding role.

COMMONLY CITED PREJUDICES BY APPLICANTS

Conflicts of Interest

- “Intervention will result in a conflict of interest because some of the pension board members are appointed by the municipality.”
 - In essence, “I will not receive a fair hearing.”
 - Administrative hearings are “governed by the fundamental principles and requirements of due process of law.” Procedures employed during an administrative hearing must be fair and impartial.

COMMONLY CITED PREJUDICES BY APPLICANTS

Conflicts of Interest – Illustrative Cases

- **No prejudice:** *Peterson v. Board of Trustees of the Firemen's Pension Fund of the City of Des Plaines*, 5 Ill. App. 3d 180 (1st Dist. 1971):
 - Applicant was not prejudiced by a municipality's intervention.
 - The board had employed independent counsel to aid it in answering legal questions, the city attorney's participation was limited to representing the city, and there was nothing to suggest that the city officials who sat on the board did not vote independently.
- **No Prejudice:** *Coyne v. Milan Police Pension Bd. ex rel. Jones*, 347 Ill. App. 3d 713, 723 (3rd Dist. 2004)
 - No conflict of interest simply because village clerk served on pension board.

COMMONLY CITED PREJUDICES BY APPLICANTS

Conflicts of Interest – Illustrative Cases

- **Prejudice:** *Williams v. Board of Trustees of Morton Grove Firefighters' Pension Fund*, 398 Ill. App. 3d 680 (1st Dist. 2010),
 - The village attorney—as a member of the pension board—made statements as an advocate rather than a disinterested decision-maker, the proceedings resulted in an unfair hearing, which prejudiced the applicant.

COMMONLY CITED PREJUDICES BY APPLICANTS

Conflicts of Interest –
Important Point to
Remember

- If a trustee is charged with a conflict of interest, they must decide whether to recuse themselves. *Williams*, 398 Ill. App. 3d at 693.
- The pension board lacks the power to disqualify a board member. *Turcol v. Pension Bd. of Trustees of Matteson Police Pension Fund*, 359 Ill. App. 3d 795, 804 (1st Dist. 2005).

LIMITATIONS ON INTERVENTION

- If a pension board allows intervention, it may also impose reasonable restrictions on the extent of the intervenor's participation. *Williams*, 398 Ill. App. 3d at 688–89 (stating a pension board has the discretion to decide who can participate in its hearings and to what extent).
 - Important tool to combat unfair prejudice.



LIMITATIONS ON INTERVENTION

Generally Appropriate Limitations

- Requiring the intervenor to pay for the costs associated with the testimony of IME physicians, if the fire protection district or municipality requests such testimony.
- Requiring the fire protection district or municipality to make an offer of proof of what its proposed witnesses will testify to.
- Limiting the amount of witnesses that the intervenor may call.
- Placing time limits on the intervenor's case in chief or for cross examination.
- Only allowing cross examination on subjects germane to its intervention interests.
- Disallowing depositions and, instead, insisting on live hearing testimony.

LIMITATIONS ON INTERVENTION

Likely Inappropriate Limitations

- Allowing the intervenor to call inappropriately few witnesses.
- Providing an unreasonably low amount of time for cross examination.
- Disallowing the intervenor from cross examining the witnesses entirely.
- Requiring the intervenor to pay the applicant's physicians testimony costs where the fire protection district or municipality objects to the physicians' reports.

PRACTICAL CONSIDERATIONS ON INTERVENTION

Weighing the Risk of Reversal

- Important to remember that intervention decisions can be appealed.
- If a board **denies** intervention and proceeds to process the application, that decision may be appealed by the municipality.
 - Higher chance of reversal.
 - Reversal means a redo of the hearing (\$\$\$\$).
 - Fewer reported cases where pension board's decision to deny intervention was upheld.
- If a board **grants** intervention, the decision may be appealed by the applicant.
 - Lower chance of reversal.
 - Many cases where pension board's decision to allow intervention was upheld.



CONDUCTING THE HEARING

CONDUCTING THE HEARING WITH AN INTERVENOR

- If intervention is granted, the fire protection district or municipality becomes a party to the disability proceeding.
- Intervening fire protection districts and municipalities are entitled to:
 - Copies of all documentary evidence;
 - Reasonable notice of the hearing;
 - An opportunity to present evidence to the pension board;
 - The ability to assert objections to offered evidence; and
 - An opportunity to be heard at the hearing.

CONDUCTING THE HEARING WITH AN INTERVENOR

Dealing with Problematic Intervenors

- Most often, municipalities and fire protection districts want to be—and are—helpful to the pension board.
- Watch for cases in which a fire protection district or municipality seeks to intervene and unduly dilate the proceedings.
 - If the intervenor wants to call 30+ witnesses, the pension board is within its rights to limit the amount of witnesses to be called.
 - If the intervenor wants to conduct depositions, the pension board can deny or substantially limit such depositions.
 - If the intervenor is otherwise dragging its feet, the pension board can set a hearing notwithstanding.
- Remember, the pension board must safeguard the right of the applicant to a fair and impartial hearing on their application.

QUESTIONS???

JAMES G. WARGO
OTTOSEN DINOLFO HASENBALG & CASTALDO, LTD.
1804 N. NAPER BLVD., SUITE 350
NAPERVILLE, ILLINOIS 60563
(630) 682-0085
JWARGO@OTTOSENLAW.COM
