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Court dismisses free speech challenge to IMRF's investments

by John E. Motylinski

Last year, the United States Supreme Court struck down Illinois' "fair share" law, which mandated public employees pay a part of their wages to a union—even if they disagreed with the union's political stances—in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018). The Supreme Court reasoned that forcing employees to fund an inherently political entity with which they did not agree was coerced speech that violated the First Amendment.

In an attempt to test the limits of *Janus*, a local union recently filed a lawsuit against the Illinois Municipal Retirement Fund (IMRF) in *Sweeney v. Illinois Mun. Ret. Fund*, 2019 WL 1254925 (N.D. Ill. Mar. 19, 2019). The union argued that investments in corporations that fund politically-adverse lobbying groups were similarly unconstitutional. The court, however, disagreed and dismissed the case.

The court concluded that IMRF's investments (and, by extension, investments made by Article 3 and 4 pension funds) in politically active corporations do not amount to coerced speech that would run afoul of *Janus* and the First Amendment.

Background: *Janus v. AFSCME*

The Supreme Court's decision in *Janus* brought a sea change in how Illinois public employers and bargaining units handle union dues. Previously, Illinois public employers were required by law to impose a "fair share" fee on employees who affirmatively opposed joining the bargaining unit's union. This was to avoid a free-rider problem.

Technically, bargaining units are separate and apart from the unions that represent them. Therefore, even though an employee is not a member of the union, he or she could still reap the benefits that came along with being a bargaining unit member. If, for instance, the bargaining unit got a raise (based on the efforts of the union during contract negotiations), so too would the union non-member. The result was that employees had no incentive to join and financially support the union.

The Supreme Court had recognized this free-rider dilemma and had previously blessed the imposition of fair share fees, which sought to compensate the union for their efforts. In *Janus*, the Supreme Court reversed its precedent on fair share fees. There, the plaintiff refused to join the union that represented his bargaining unit because he disagreed with many of the union's political and collective bargaining positions. When he was charged a fair share fee, he sued the State of Illinois (his employer) alleging that the State was forcing him to support a cause he did not support in violation of the First Amendment.

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New law addresses unclaimed benefits or abandoned pension fund contributions

by Michael B. Weinstein

A new state law, effective for the most part on January 1, 2020, should finally resolve the question of what a police or fire pension fund must do when a pension benefit is unclaimed or abandoned. Public Act 101-0546 (Senate Bill 1246) amends the "Revised Uniform Unclaimed Property Act" (765 ILCS 1026/15-1 *et seq.*) by adding two new sections (Sections 15-1505 and 15-1506) that specifically address pension fund benefits.

Section 15-1505 mandates that a retirement system, pension fund, or investment board reports the name of the owner, the names of any beneficiaries, the last known address (if known), the Social Security number or taxpayer identification number (if known or readily ascertainable), and the unclaimed or abandoned dollar amount to the Administrator of the Unclaimed Property Act (i.e., the Illinois State Treasurer) prior to November 1 of each year.

Each report would cover the 12 months preceding July 1 of each year. Thus, beginning no later than November 1, 2020, and each November 1 thereafter, an Article 3 or Article 4 pension fund that is holding an unclaimed or abandoned benefit because the recipient is nowhere to be found must report the above-noted information to the state treasurer.

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Why obtaining entry-level medical information is critical for pension boards

by Shawn P. Flaherty

Within the small stack of paperwork that a pension fund board collects from its newly hired full-time police and firefighter members is information concerning the new hire's current medical condition and medical certification that the new hire is physically able to meet the requirements of his or her new job. The employing municipality or fire protection district is required by law to have all new candidates for hire undergo a comprehensive medical physical examination to determine that the candidate is capable of performing the job responsibilities and tasks as set forth in the job description. In turn, proof of the candidate's passage of this examination needs to be forwarded to the respective pension fund for its candidate file.

Following the advent of the federal Americans With Disabilities Act (ADA)(42 U.S.C. §12101 et seq.) in 1990, a greater degree of scrutiny was placed on employers and limitations were established on the scope of medical inquiries that could be undertaken by would-be employers prior to the issuance of a conditional offer of employment to a prospective employee. The ADA mandates were ripe for employment-based litigation in the early 1990s, including a federal case in the City of Aurora filed by a police officer who claimed he was denied entry into the Aurora Police Pension Fund in violation of the ADA due to his diabetic condition. *Holmes v. City of Aurora*, 1995 WL 21606 (N.D. Ill. 1995). As a part of settling this litigation, the federal court issued a consent decree with the US Department of Justice and the State of Illinois that protects persons with disabilities from being denied entry into all Illinois police and firefighter pension funds in violation of the ADA.

Prior to 1995, Articles 3 and 4 of the Illinois Pension Code contained language that permitted police and firefighter pension funds to deny new hires from entering the pension fund for failing to meet certain physical or mental fitness requirements as established by the funds. Specifically, police pension funds were required to screen new hires and only admit into the pension fund those persons who were "found upon examination of a duly licensed physician or physicians selected by the Board to be physically and mentally fit to perform the duties of a policeman." (40 ILCS 5/3-106).

Similarly, firefighter pension funds were required to admit new hires into the pension fund if the new hire "was found upon a medical examination by a duly licensed physician selected by the board to be then physically and mentally fit to perform the duties of a firefighter." 40 ILCS 5/4-107(b)). Both sets of requirements were statutorily repealed with the adoption of P.A. 89-52 on June 30, 1995.

Following the adoption of P.A. 89-52, all new full-time hires who otherwise met the definition of a "police officer" or "firefighter" were allowed to enter the fund without a preliminary medical evaluation by the pension fund. In other words, if the new hire passed the entry-level medical examination required by the municipality or fire protection district, the pension fund was required to accept the new hire as a member. This significant change in a pension board's processing of a new member into the fund does not eliminate the need of a pension board to request and file away entry-level medical information for its newest members.

Pension boards must be proactive with their municipalities and fire protection districts to ensure that pension boards are provided with some details of any preexisting medical conditions that the newly hired member may have. The best way to ensure the receipt of the appropriate information is to collect the requisite information from the entry-level medical provider through use of a physician certification form. This form will identify the name of the new member and be signed by the evaluating physician. While pension boards are no longer entitled by law to a full narrative of the physical condition of the new employees, they are allowed to request whether the new hire has heart disease, cancer, stroke, tuberculosis, or any disease of the lungs or respiratory tract. The physician will answer each question "yes" or "no" and then provide a description of any matters checked off as "yes".

Police pension boards should consider retaining this information in the event a member files for a heart attack or stroke pension pursuant to Section 3-114.3 of the Code (40 ILCS 5/3-114.3). For firefighter pension boards, this information is important to file away for possible future use in the event the member ever files for an occupational disease disability pension pursuant to Section 4-110.1 of the Code (40 ILCS 5/4-110.1). This matter is more acutely important for firefighter pension funds since the occupational disease pensions cannot by law be provided unless the firefighter was free from the underlying condition at the time of hire.

While police and firefighter pension boards no longer serve as gatekeepers for entry into the funds, they remain fiduciaries to the fund. And among the many fiduciary duties of a pension fund trustee is to be careful and circumspect in awarding disability pensions to preserve the assets of the fund. Obtaining pre-hire medical information and storing it in a sealed envelope within the pension file will assist current and future pension board members in better evaluating disability applications when they arise. ■

Free speech challenge

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The Supreme Court ultimately agreed with him and held that the State's law requiring that he subsidize an organization with which he disagreed (i.e., the union) was unconstitutional coerced speech.

Sweeney v. IMRF: The Facts

The *Janus* decision was viewed as a sweeping blow to public sector labor unions.[1] Recently, however, a local chapter of the AFL-CIO labor union tried to use *Janus* as a tool of its own to challenge IMRF's ability to invest in corporations that supported the American Legislative Exchange Council - a lobbying group commonly referred to as "ALEC."

ALEC lobbies for the adoption of "model bills" focusing on issues including weakening labor unions and public pension funds. Such model bills often propose increasing employee contributions, raising the retirement age and number of years of service required for vesting, and moving from defined benefit plans (such as public pensions) to defined contribution plans (such as 401k or 457 plans).

For its part, IMRF is a multi-employer public pension fund that administers disability, retirement, and death pension benefits for employees of local governments in Illinois. Created by the Illinois General Assembly (40 ILCS 5/7-101 *et seq*.), IMRF consists of more than 410,000 members and approximately 3,000 participating units of local government. IMRF is funded by mandatory member contributions, as well as employer contributions, and investment returns. IMRF has the power—and duty—to make investments to maximize its assets. (40 ILCS 5/7-201.)

According to the complaint, many of the publicly traded companies in which IMRF has invested, including AT&T, Exxon Mobil, Pfizer, UPS and Anheuser-Busch, provide financial support to ALEC.

Sweeney v. IMRF: The Court's Decision

Finding IMRF's indirect funding of ALEC to be abhorrent, the union sued IMRF for allegedly violating their First Amendment rights. Indeed, the union argued that IMRF's use of employee's mandatory contributions to invest in ALEC-supporting companies was the same compelled speech that was stricken in *Janus*.

> *"As long as Illinois' law authorizing IMRF to make investments was "viewpoint neutral" (i.e., it does not on its face express a political opinion), it is acceptable.*

However, the court disagreed that *Janus* applied and ultimately dismissed the case. The court framed the key issue as whose speech, if any, the union was forced to subsidize. Critically, unlike in *Janus* where the employee's contribution went to a private entity (the union), the union members' contributions in *Sweeney* went to IMRF. Therefore, IMRF's speech had to be the operative subject of the union's challenge - not, as the union suggested, the speech of the corporations that IMRF invested in or that of ALEC.

With IMRF's speech fixed as the proper subject of inquiry, the court quickly disposed of the union's free speech claim. For one, the court expressed doubt that IMRF's investments were speech capable of being challenged in the first instance; rather, they were more akin to free market transactions seeking profit. In essence, the court did not think that investments alone constituted IMRF putting words in the union's mouth.

Even if IMRF's investments were speech, however, it was non-actionable governmental speech. Unlike speech by private individuals, the First Amendment's Free Speech Clause does not restrict what a government says. See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). As such, the court concluded that, as long as Illinois' law authorizing IMRF to make investments was "viewpoint neutral" (i.e., it does not on its face express a political opinion), it is acceptable. Because IMRF had lawful authority to invest and did so without making any sort of political comment, it could not be liable under the First Amendment.

Conclusion

The *Sweeney* case illustrates that pension board trustees need not fear First Amendment challenges when it comes to investments. When a pension board makes investments, it is not "speaking" in a manner that is capable of being challenged under the First Amendment. To the extent that a particular investment is otherwise allowable by law, trustees need not concern themselves with the politics of the corporations in which they invest. Accordingly, the *Janus*' ruling will not extend to the affairs of pension funds that are merely operating to fulfil their fiduciary duties. ■

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[1]*See, e.g., In a Blow to Unions, Government Workers No Longer Have to Pay Fair Share Fees*, Chicago Sun Times (July 1, 2018), https://chicago.suntimes.com/2018/7/1/18327718/in-a-blow-to-unions-government-workers-no-longer-have-to-pay-fair-share-fees.

Abandoned property

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Additionally, Section 15-1506, which specifically applies to Article 3 and Article 4 funds, mandates minimum due diligence standards for searching for the apparent owner of unclaimed or abandoned benefits. For example, not less than 90 days before filing the annual report to the state treasurer, a fund must attempt to contact the apparent owner of the benefit using, in any order, first class mail, telephone, or electronic mail.

Although somewhat unclear, it appears that all three methods should be used, to the extent that they are available to a fund. In any event, the fund should use the most current contact information available for the apparent owner. If the apparent owner does not respond or otherwise indicate interest in the property in response to these "routine" methods then the fund shall send a notice, by certified mail, to the apparent owner not less than 60 days prior to filing the annual treasurer's report.

Additionally, each fund is required to ask any employer or former employer to search its records for more current contact information for an apparent owner, as well as more current contact information for any beneficiaries. In turn, the employer or former employer is required, unless prohibited by other state law, to make available to the fund any information that would allow the fund to determine the current address of an apparent owner.

Similarly, when an apparent owner has designated beneficiaries, the fund must attempt to contact such beneficiaries using the same "routine" methods noted above, if the fund has contact information for those beneficiaries. Additionally, the law allows a fund to make reasonable use of Internet search tools that do not charge a fee to search for an apparent owner.

Finally, if the benefit(s) is in excess of $1,000, the fund must undertake additional due diligence, including the use of Internet search tools, commercial locator services, credit reporting agencies, information brokers, investigation databases, and analogous services that may charge a fee. Since monthly pension benefits can quickly exceed $1,000, the use of such search tools will often be required. On the other hand, if the benefit is less than $50, the fund does not need to engage in due diligence, nor does a fund need to send mail or electronic mail to an address that it knows to be invalid.

Furthermore, a pension fund must enter into an interagency agreement with the State Treasurer concerning the implementation of the due diligence requirements. The agreement shall specify that the fund must annually certify that it meets or exceeds the due diligence requirements set forth in Section 15-1506. This requirement appears to apply to all Article 3 and Article 4 funds whether they currently have unclaimed or abandoned benefits.

Finally, recognizing a fund's fiduciary obligations under federal law, Section 15-1506(f) recognizes that if the United States Department of Labor issues guidance or regulations that conflict with the state's due diligence requirements, the fund shall comply with the federal guidance or regulations.

However, most importantly, and notwithstanding all of the foregoing due diligence and reporting requirements, Section 15-1505(d) provides that an unclaimed or abandoned annuity, pension, or benefit fund held in a fiduciary capacity should not be turned over to the State Treasurer, thus acknowledging a fund's fiduciary obligations to its members.

What does all this mean? It appears that the State has finally provided guidance to Article 3 and Article 4 funds with respect to unclaimed or abandoned benefits. While the new law specifies minimum due diligence and reporting standards, it does not require that unclaimed benefits be turned over to the State of Illinois as abandoned property, thus recognizing a fund's fiduciary obligations to its members.

Presumably, the State Treasurer will list the unclaimed or abandoned benefits on the Treasurer's unclaimed property website (https://icash.illinoistreasurer.gov/); however, the property will, at all times, remain with the fund, which will engage in the required due diligence to also attempt to locate the apparent owner or beneficiary of the unclaimed benefits. ■

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