SECOND DIVISION
August 28 2012

No. 1-12-0241

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GARY MONTINO,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellant,	)	of Cook County
	)	
v.	)	No. 10 CH 47172
	)	
BOARD OF TRUSTEES OF THE MELROSE PARK POLICE PENSION FUND,	)	Honorable
	)	Mary Anne Mason,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: The five felony convictions committed by plaintiff in connection with the performance of his duties as a Deputy Chief of the Melrose Park Police Department disqualified him from receiving any further pension benefits from the Melrose Park Police Pension Fund.

¶ 2 Introduction

¶ 3 Plaintiff, a retired Deputy Chief of the Melrose Park Police department (MPPD), brought this

action against the board of trustees of the Melrose Park Police Pension Fund (the Board), seeking judicial review of the Board's final administrative determination that the plaintiff's pension was terminated due to his felony convictions for his criminal conduct that occurred in conjunction with his employment as a police officer with the MPPD. The circuit court affirmed the Board's action.

¶ 4 Background

¶ 5 Plaintiff was employed as a police officer of the MPPD for approximately 26 years, beginning in 1983. In July 2007, plaintiff, the Deputy Chief of the MPPD was indicted along with several other MPPD police officers in federal court. *United States v. Scavo, et al*, 07 CR 458 (NDIL)

¶ 6 Count One of the federal indictment identified the MPPD as the "enterprise" or group of individuals engaged in criminal activity and charged the plaintiff, as a member of that group with conspiracy to commit racketeering by conspiring with the Chief of the MPPD and other MPPD police officers to defraud Melrose Park taxpayers by using MPPD personnel and property to operate private security businesses and to provide personal services to the Chief of the MPPD and allow ghost-payrolling at the MPPD to facilitate these criminal schemes.

¶ 7 Count Two through Count Five of the federal indictment charged the plaintiff with mail fraud which he engaged in to facilitate numerous acts of racketeering involving the above-described criminal enterprise.

¶ 8 While plaintiff's criminal case was pending and before his jury trial, plaintiff retired from the MPPD in August 2009 and began receiving a monthly pension. About a month prior to his retirement, by letter dated July 23, 2009, plaintiff was informed that the Board was gathering evidence of his alleged crimes and would schedule a hearing on the effect, if any, his crimes would

have on his pension.

¶ 9 In 2010, plaintiff's federal criminal case proceeded to trial and a jury found plaintiff guilty of all five felony counts on May 5, 2010. Judgment was entered by the court on May 25, 2010. Plaintiff was sentenced to one year and a day in prison. He did not appeal his criminal conviction.

¶ 10 Following his conviction, the Board sent a notice to the plaintiff of a public hearing scheduled for July 8, 2010 regarding plaintiff's felony convictions to determine whether pursuant to section 5/3-147 of the Pension Code (40 ILCS 5/3-147(West 2008)), his felony convictions caused plaintiff to forfeit his right to benefits in the Melrose Park Police Pension Fund. Plaintiff was informed that he was entitled to be represented by counsel, to present any evidence and to respond to evidence before the Board.

¶ 11 As scheduled, the Board held the hearing on July 8, 2010 to determine whether plaintiff was convicted of any service-related felonies because conviction of any service-related felonies requires the Board to terminate plaintiff's pension. At the hearing, plaintiff indicated his desire to proceed *pro se.* Plaintiff testified at the hearing in rebuttal to the jury verdicts of guilty by stating that "... I did a few things wrong..., but these charges that were put on me is something that I didn't do." Plaintiff admitted during his testimony before the Board that the records seized by federal agents relating to the criminal enterprise scheme of illegally using MPPD personnel and property were confiscated from his office at the MPPD. Plaintiff also admitted that he took part in the ghost-payrolling scheme involving the performance of personal work by on-duty officers for the Chief of the MPPD and the private security firm scheme.

¶ 12 At the conclusion of the hearing, the hearing officer for the Board stated that the Board could

not take any final action on plaintiff's case because there is a requirement that the Board have a transcript of the hearing before taking final action. Whereupon, the Board adjourned to a closed session to discuss plaintiff's case. When the hearing was reopened to the public, the hearing officer again stated twice on the record that "[n]o final action has been taken." The Board made a motion to retain plaintiff's pension. By unanimous Board vote, the motion that plaintiff should keep his pension was passed. Board member Spino, when casting his vote stated as follows: "I've known [the plaintiff], his brother, his father and I've known them to always be honest people, and I vote yes," despite the fact that neither plaintiff's brother nor father testified at the hearing or submitted other evidence. The hearing officer stated he needed a transcript to prepare a final order and that "[i]t will take a while." The Board stated its intent to not meet again until September and the Board hearing involving the plaintiff was adjourned.

¶ 13 The hearing officer for the Board stated he received the transcript of the July 8, 2010 hearing on July 26, 2010 and forwarded it to the Board for review. The next day, the hearing officer underwent an emergency appendectomy and was out of the office for recuperation. Additionally, he had a London trip scheduled for mid-August that he did not cancel.

¶ 14 Plaintiff was given a notice on September 8, 2010 that the Board intended to hold another hearing on September 15, 2010 involving whether any of plaintiff's five felony convictions should cause plaintiff to lose his pension benefits, this time *via* the Board's motion to reconsider the Board's July 8, 2010 oral vote to not terminate plaintiff's pension. No written decision and order by the Board had yet been issued.

¶ 15 At the September 15, 2010 board hearing, plaintiff was represented by counsel. As a

preliminary announcement the hearing officer, on the record, stated:

> "At the conclusion of the hearing [on July 8, 2010], I advised Deputy Chief Montino, who was not represented by counsel at the time, that I would prepare a written decision and order that would become the final decision as to the claim, and that the 35 day time period under administrative review would not begin to run until the Board issued a written decision and order."

¶ 16 The hearing officer reported that, sometime after the July 8, 2010 hearing and before the September 15, 2010 hearing, an agent of the Illinois Department of Insurance contacted him. The hearing officer reported on the record at the September 15, 2010 hearing that the agent "intends on citing the Board for violating [the] Pension Code, and that the Attorney General's Office has been brought in or wants to take legal action against the Board " and that "the Board would be sued, the Members would be sued individually for breach of their fiduciary [duty]." The hearing officer also acknowledged that the Board's case involving plaintiff 's felony convictions and his pension had received press coverage and that the hearing officer received a number of inquiries from the press which he declined to answer.

¶ 17 Plaintiff's attorney made five objections to the Board's motion to reconsider its oral vote of July 8, 2010, as follows: (1) there was no change in the law applicable to the situation and the transcript of the hearing does not reflect that the Board erroneously applied the law; (2) there was no new evidence presented to add to what the Board had before it when it took an oral vote; (3) the Board should be equitably estopped from reconsidering its oral vote after plaintiff detrimentally

relied on it for seventy days in making financial decisions; (4) any threats of lawsuits should not affect the Board's exercise of its fiduciary duties; and (5) that the only way to overturn its oral vote is *via* a request for administrative review in state court. After plaintiff's attorney made his full presentation, the Board retired to executive session to discuss plaintiff's case.

¶ 18 When the Board returned to open session, two oral votes were taken on two motions. The motion to reconsider its July 8, 2010 vote passed 4-1 which had the effect of vacating the unanimous oral vote on the prior motion to retain plaintiff's pension. The second motion was for a finding by the Board that one or more of plaintiff's felony convictions was related to his service as a police officer on the MPPD. The motion passed 4-1. The Board reaffirmed that when their written, signed order is served upon the plaintiff pursuant to statute that is the date the oral vote becomes a final order. The Board signed a seventeen-page Decision and Order in plaintiff's case on October 15, 2010 which represents the final decision of the Board. The Board determined that plaintiff's felony convictions were related to, arose out of and/or were in connection with his service as a police officer with the MPPD. Pursuant to section 5/3-147 of the Pension Code, the Board revoked and rescinded the pension previously awarded to plaintiff when he retired in 2009 and determined that plaintiff was no longer eligible for any benefits under Article 3 of the Pension Code, effective October 15, 2010.

¶ 19 Plaintiff filed a complaint in the circuit court wherein he requested judicial review of the Board's administrative action. The case was fully briefed and oral argument was held on November 11, 2011. The circuit court affirmed the administrative action by the Board. This timely appeal followed.

¶ 20 Analysis

¶ 21 a. Standard of Review

¶ 22 Judicial review pursuant to the Administrative Review Law (735 ILCS 5/3-101(West 2008)) has this court review the Board's decision and not the circuit court's decision. *Phelan v. The Village of LaGrange Park Police Pension Fund*, 327 Ill. App. 3d 527, 531 (2001). The Board's findings of fact are considered *prima facie* true and are not to be overturned unless they are against the manifest weight of the evidence. *Id.* (citing *Launius v. Board of Fire and Police Commissioners of Des Plaines*, 151 Ill. 2d 419 (1992). However, any of the Board's conclusions of law are reviewed *de novo*. *Id.* (citing *Envirite Corp. v. Illinois Environmental Protection Agency*, 158 Ill. 2d 210 (1997)). In our review, substantial deference is given to the Board's application of a statute which the Board administers. *Id.* (citing *DiFiore v. Retirement Board of Policemen's Annuity*, 313 Ill. App. 3d 546 (2000)).

¶ 23 In this case, the Board evaluated the application of the language of section 3-147 of the Pension Code (40 ILCS 5/3-147 (West 2008), to plaintiff's case. Section 3-147 of the Pension Code states, in part, as follows: "Felony conviction. None of the benefits provided for in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as a police officer."

¶ 24 Plaintiff raises three issues on appeal as follows: (1) Whether the unanimous oral vote by the Board on July 8, 2010 that indicated plaintiff could retain his pension despite his five felony convictions for running a criminal enterprise out of and with the personnel and property of the MPPD was a final administrative decision despite the fact that plaintiff was informed that it was not

a final decision and the Board did not issue a final written decision until October 15, 2010; (2) Whether the doctrine of equitable estoppel bars the Board from reconsidering its July 8, 2010 oral vote allowing plaintiff to retain his pension; and (3) Whether the indictment and resulting jury verdict convicting the plaintiff on all five felony counts provided evidence that showed a sufficient nexus between plaintiff's five felony convictions and his employment as Deputy Chief of the MPPD to justify revocation of his pension benefits.

¶ 25 b. The Board's July 8th Oral Vote Was Not a Final Decision and Order

¶ 26 As to the first issue, it is clear that when the Board voted on July 8, 2010, that vote was based on an erroneous application of section 3-147 of the Pension Code. 40 ILCS 5/3-147 (West 2008). Counsel for the Board admitted during oral argument before the circuit court that the Board had made a mistake. The Board had not issued a final written decision and order which is mandated by the Administrative Review Law. 735 ILCS 5/3-113 (West 2008); see *Board of Education of Valley View Community Unit School District No. 365U v. File*, 89 Ill. App. 3d 1132 (1980). Therefore, the Board retained jurisdiction to amend its preliminary oral vote on the matter. Absent a final written order, the Board's oral indication on July 8, 2010 that it intended to allow plaintiff to retain his pension is not a final administrative decision. In fact, immediately after the oral vote, the hearing officer stated: "I will prepare a written decision and order that will become the final decision as to the disability [sic] claim, and that will explain all the reasons. The Board will sign off on that. You will be served with a copy of that written decision. The 35-day time period will run from the time that it is placed in the mail to you. It will take a while." These statements by the hearing officer are a clear indication that the Board did not intend, in any way, for the oral vote on July 8, 2010 to be

a final, appealable order or its final administrative decision. No one, including the plaintiff who was appearing *pro se* at the July 8th hearing, could reasonably have understood that the decision was final given the hearing officer's statement to the contrary.

¶ 27 In *Pernalski v. Illinois Racing Board* , 295 Ill. App. 3d 499 (1998), a horse trainer sought review of a decision by the Illinois Racing Board (IRB) which upheld a racetrack decision to bar the trainer from its track. After a hearing before the IRB, the Board issued an oral order upholding the exclusion of Pernalski. Pernalski's attorney obtained a copy of the transcript of the hearing and on September 11, 1995, he filed a complaint for administrative review in the circuit court. On September 19, 1995, the Board issued its written order of disposition. The circuit court affirmed the IRB's decision and Pernalski appealed. This court dismissed the appeal, finding that the circuit court had no jurisdiction to consider Pernalski's appeal because the complaint for administrative review had been filed prematurely. The appellate court explained that allowing the unilateral action of a party to determine when the 35-day period in which to seek administrative review began "would jeopardize rather than expand the appellant's right to appeal. Nor have the parties contended that once having voted, the Board is precluded from reconsidering its vote and changing its determination before serving the written order upon the impacted party. Thus, the finality of the order cannot be presumed until it is actually served upon the party whose rights are being adjudicated." *Id.* at 504-05.

¶ 28 Plaintiff argues that *Pernalski* is inapposite as the IRB was also governed by administrative rules which are not applicable in the instant case. It is the reasoning of the holding in *Pernalski* which is persuasive and it did not rely on the IRB's administrative rules. Further, in *Batka v. Board of Trustees of Orland Park Police Pension Fund*, 227 Ill. App. 3d 735, 745 (1992), this court held

"without a final written decision from [the Board], plaintiff is precluded from administrative review of the Board's failure to pay retroactive benefits."

¶ 29 On appeal, plaintiff argues that as the Board's reversal of its July 8, 2010 decision was not based on newly discovered evidence, changes in the law, or errors in the application of the law, it acted improperly and without jurisdiction in reconsidering its July 8, 2010 decision.

¶ 30 The Board, acting as a quasi-judicial, administrative body, has jurisdiction to reevaluate and reconsider its opinions up until the time those opinions and decisions are finalized in a written decision and order. The Board certainly had jurisdiction to consider whether its first oral vote on plaintiff's matter was erroneous. The hearing officer stated at the July 8th hearing that a final decision could not be issued without the Board being furnished with a transcript of the hearing. The board did not need additional evidence or new law to consider. It could have merely considered the transcript of the first hearing. In *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 522 (2007), this court explained that the purpose of a motion to reconsider is to bring to the court's attention "(1) newly discovered evidence which was not available at the time of the first hearing, (2) changes in the law, or (3) error in the court's previous application of extisting law." *Id*. The transcript of the July 8th hearing demonstrates that the Board's oral vote resulted from the Board's misapplication of existing law. *Id.* Further, the Board actually gave the plaintiff a second opportunity on September 15, 2010, to present any addtional evidence and argument before the Board made a final determination. Plaintiff took full advantage of that opportunity and for the second hearing hired an attorney to advocate on his behalf, although the attorney failed to present any evidence on plaintiff's behalf.

¶ 31 c. Plaintiff's Equitable Estoppel Argument Falls Flat

¶ 32 In order to consider plaintiff's equitable estoppel argument we must first assume the plaintiff did not understand the clear statement by the hearing officer that the oral vote was not a final decision and it was reasonable for him to construe it as a final decision. The hearing officer repeated three times at the hearing that the oral vote was not a final decision. Even though this assumption is impossible under any reasonable man standard, we will evaluate the other elements of the estoppel doctrine for completeness.

¶ 33 A party usually invokes equitable estoppel to prevent an opponent from changing positions when 1) he was an adverse party to someone in a prior proceeding, 2) he detrimentally relied on his opponent's prior position; and 3) he would be prejudiced if the court permitted his opponent to change positions. In this case, plaintiff is not arguing for equitable estoppel against an adverse party, but the decision-making body in his case. The Board was charged with making an unbiased decision on the issue of forfeiture of his pension. The application of equitable estoppel in this case against the Board while it was acting in its quasi-judicial capacity could only be justified by extreme circumstances where the plaintiff relied on the Board's oral vote to his substantial detriment. *Trochelman v. Village of Maywood*, 259 Ill. App. 3d 1, 4 (1994) ("The doctrine of estoppel may not be invoked against a governmental agency except in extraordinary circumstances..."). The substantial loss required for equitable estoppel to be applied is simply not present in this case. The plaintiff argued he detrimentally relied on the announced oral vote on July 8th by not putting his house up for sale and by re-enrolling his children in a private school. No financial loss is quantified. There is no proof that he could have sold his home in the current weak housing market that has been

in existence since at least 2008. In fact, as our economy recovers, especially in the housing market, not selling his home may have financially benefitted him. The plaintiff presents no evidence that he was barred from taking his children out of school and receiving a tuition refund or just letting them complete the schooling already paid for. These equivocal circumstances are not evidence of the type of "substantial loss" required to invoke equitable estoppel against the Board.

¶ 34 Plaintiff relies on the case of *Rossler v. Morton Grove Police Pension Board*, 178 Ill. App. 3d 769 (1989), in his argument in support of the application of equitable estoppel. Not only is *Rossler* not a case involving application of the felony divestiture statute, but the facts are not even close to plaintiff's case. In *Rossler*, plaintiff obtained the opinion of both the pension board and numerous municipal officials that a leave of absence would count as creditable service. Plaintiff then applied for his retirement and was awarded a pension which included his leave of absence as creditable service. This was the pension board's final decision. After plaintiff's retirement, he moved to another part of the country. If the pension board were allowed to subsequently revoke its final decision and be allowed to rule that plaintiff's leave of absence was not creditable time for purposes of his pension, plaintiff would have been required, more than two years after his retirement, to move back to Illinois and resume employment as a police officer for seven more months. These facts were found to satisfy the "substantial loss" test and the court applied equitable estoppel to prevent the pension board from overruling its prior final decision.

¶ 35 In the instant case, we do not even have a final board decision on July 8th, 2010, and plaintiff was repeatedly informed that it was not a final decision. The time period from the evening of July 8th until notice was sent on September 8th to plaintiff of a second hearing on the matter was a mere

two months. During that time, plaintiff continued to receive the pension benefits which the Board later determined he was not entitled to receive. If anything, plaintiff benefitted from the short two-month period from the legally erroneous, oral vote taken on July 8th to the date of the Board's notice to him of a second hearing on the matter.

¶ 36 d. "But For" Plaintiff's Position at the MPPD, His Crimes Could Not Have Been Committed

¶ 37 The primary issue before the Board was whether there was a nexus between plaintiff's service as a member of the MPPD and the felonies of which he was convicted. After reviewing the indictment and the jury's guilty verdicts as well as plaintiff's testimony before the Board where he admitted to ghost-payrolling and the seizure of business records of the criminal enterprise from his MPPD office, we find that the final decision of the Board is amply supported.

¶ 38 By the preliminary July 8th vote, it appears the Board was ready to award a MPPD police officer who was convicted of five felonies for criminally using his position on the MPPD to his personal benefit and to the detriment of the public continued pension benefits in direct contravention of section 3-147 of the Pension Code. 40 ILCS 5/3-147 (West 2008) . The basis for this vote is unfathomable.

¶ 39 It is difficult to understand how the facts of this case ever fell, at any time, into a grey or questionable area. Thankfully, due to the Board's motion to reconsider, it reached, on its own, a moment of truth and the right course of action was taken by the Board to deny the plaintiff his pension — a course of conduct that should have been obvious from the beginning to even the most casual observer.

¶ 40 At stake in the Board's decision is the integrity of hard-working, law-abiding public

employees and the standing of every responsible police officer in the state of Illinois who depends upon the Pension Code to protect their hard-earned pensions. The kind of behavior and breach of public trust committed by the plaintiff, a Deputy Chief of MPPD, should have zero tolerance.

¶ 41 The nexus between plaintiff's service as a member of the MPPD and the felonies of which he was convicted is much stronger than that found in *Devoney v. The Retirement Board of the Policemen's Annuity & Benefit Fund for the City of Chicago*, 199 Ill.2d 414, 422 (2002). There, the indictment did not identify Devoney as a police officer, proof of his status as a police officer was not necessary evidence to establish his guilt and Devoney's association with the police department was never mentioned in the plea agreement on the mail fraud count to which Devoney pled guilty. In spite of this, the supreme court held that "there was ample ground for the Retirement Board's finding that 'but for the fact that Devoney was a Police Officer of high rank,' he 'would not have been in a position or selected to participate in the scheme to defraud [which led to his conviction].' " *Id.* at 423.

¶ 42 In the instant case, the MPPD where plaintiff worked was identified in the indictment as the criminal enterprise. But for plaintiff's role as Deputy Chief of the MPPD, he would not have been in a position to engage in this criminal activity as it was structured. *Id.* at 423. Plaintiff's criminal conduct also has a much stronger nexus to his position as a police officer than the *Siwek* case where the court upheld a termination of pension benefits because Siwek gained special knowledge as an officer and his relationship with an informant he met during his service facilitated his drug possession conviction. *Siwek v. Retirement Board of Policemen's Annuity & Benefit Fund*, 324 Ill. App. 3d 820, 829 (2001).

¶ 43 Plaintiff complained that local media and other governmental agencies stepped in after the

July 8th initial vote and he blames them for putting pressure on the Board to forfeit his pension. However, the Pension Code, (1) defines "fiduciary" so as to include members of the board of trustees, (40 ILCS 5/1-101.2); (2) provides that any fiduciary may be personally liable for a breach of fiduciary duties; (40 ILCS 5/1-114); (3) authorizes the Attorney General to seek relief for any violations of the Pension Code, (40 ILCS 5/1-115); and (4) provides for examinations of the pension fund by the Department of Insurance, including a determination as to whether statutory provisions are being given full effect. (40 ILCS 5/1A-104 (b)(4)). As summarized by the Board's hearing officer, the Department of Insurance's response to the Board's oral vote of July 8th was based on the above provisions.

¶ 44 Regardless of whether it was through public pressure, media spotlight or threats of suits by government agencies, the Board did the right thing in the end and held plaintiff accountable for his felony convictions which were inextricably intertwined with his position on the MPPD and deprived him of his pension. It was not the media or other government agencies who are responsible for plaintiff's lost pension. Plaintiff is responsible. The Board's decision fulfills the purpose of the felony divestiture section of the statute which is to "..ensure that the retirement of a corrupt public servant is never financed by the very constituency whose trust was betrayed." *Ryan v. Board of Trustees of the General Assembly Retirement System*, 236 Ill.2d 315, 323 (2010). The Board's decision also "...discourage[s] official malfeasance by denying the public servant convicted of unfaithfulness to his trust the retirement benefits to which he otherwise would have been entitled." *Kerner v. State Employees' Retirement System*, 72 Ill. 2d 507, 513 (1978).

¶ 45 Conclusion

¶ 46 For all the foregoing reasons, this court affirms the Board's decision.

¶ 47 Affirmed.