2014 IL App (1st) 133118-U

SIXTH DIVISION
June 27, 2014

No. 1-13-3118

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELEANOR M. VENTIMIGLIA, Plaintiff-Appellant, v. NICHOLAS CHIARO, CHAIRMAN ROBERT MUEHLENBECK, ROBERT NEIL, JEFF ROTKVICH, DANIEL NIEMANN, Collectively, the Pension Board of the Des Plaines Police Pension Fund and Trustees of the Des Plaines Police Pension Fund, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 10 CH 1385 Honorable Kathleen Pantle, Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

O R D E R

¶ 1 ***Held*****:** We confirmed the Pension Board's denial of plaintiff's claims for surviving spouse benefits under section 3-112(a) of the Pension Code where, at the time of the participant's death, plaintiff was divorced from the participant.

¶ 2 Plaintiff, Eleanor Ventimiglia, the former wife of John Stephens, who at the time of his death was a retired Des Plaines police officer, was denied survivor benefits by defendant, the Pension Board of the Des Plaines Police Pension Fund (the Board) under section 3-112(a) of the Pension Code (Code). 40 ILCS 5/3-112(a) (West Supp. 2011). On administrative review, the

circuit court upheld the Board's decision. Plaintiff *pro se* has appealed seeking reversal of the Board's decision. We confirm the Board's denial of plaintiff's claims for survivor benefits.

¶ 3 John G. Stephens (Officer Stephens) became a Des Plaines police officer on March 21, 1966. Plaintiff and Officer Stephens were married in Illinois on January 10, 1994. It appears plaintiff and Officer Stephens moved to Nevada during the marriage. Officer Stephens retired from the police force on July 31, 1994, and on August 1, 1994, Officer Stephens began receiving retirement benefits.

¶ 4 On March 5, 2009, a decree of divorce was entered in *Stephens v. Stephens* (case number D-08-398621-D), in the Eighth Judicial District Court, Family Division, Clark County, Nevada, which dissolved plaintiff's marriage to Officer Stephens. The decree provided that the marital interest in Officer Stephen's monthly retirement benefit was 2.346%, or $92 per month, and Officer Stephens was to pay plaintiff 50% of this amount, or $46 per month. On July 29, 2009, the Nevada court entered an order pursuant to plaintiff's "motion to reopen the decree or in the alternative to adjudicate omitted asset and modify spousal support." This order directed that the divorce decree was "amended *nunc pro tunc*" as to Officer Stephen's "survivor benefits from his Illinois retirement," and further ordered that "so long as there is no negative impact on John's monthly benefit received during his life, [plaintiff] shall be designated as a beneficiary of survivor benefits, for the benefit of the child, to the extent based on the election of [plaintiff] as a beneficiary at the time of John's retirement."

¶ 5 Officer Stephens died on November 27, 2009. He was survived by plaintiff's son, Dylan Stephens, whom Officer Stephens adopted on January 21, 1997.

¶ 6 On December 17, 2009, plaintiff filed an application with the Board for survivor benefits for herself and for her son pursuant to section 3-112(a) of the Code. The application was granted as to Dylan, but denied as to plaintiff. Plaintiff requested a hearing before the Board. A hearing was held on October 11, 2011, where plaintiff was represented by counsel. At the hearing, plaintiff testified to certain of the facts set forth above and argued, because she was married to Officer Stephens at the time he began to receive his retirement benefits, she was entitled to survivor benefits under section 3-112(a) of the Code.

¶ 7 The Board admitted into evidence certain records, including: (1) Officer Stephen's personnel file; (2) the decree of adoption for Dylan; (3) correspondence between plaintiff and the Pension Fund relating to her application for survivor benefits under section 3-112(a) of the Code; and (4) the orders from the Nevada divorce proceedings.

¶ 8 After the hearing, the Board issued a decision on November 15, 2011, denying plaintiff's application, finding that she did not qualify for surviving spouse benefits. Additionally, the Board found: (1) at the time of Officer Stephen's death in November 2009, plaintiff was not his spouse, but had been divorced from Officer Stephens in March 2009; (2) surviving spouse benefits accrue at the time of the participant's death and not at the time of retirement; and (3) the orders in plaintiff's divorce proceedings do not control a determination of survivor benefits under the Code.

¶ 9 On December 22, 2011, plaintiff filed a complaint for administrative review of the Board's decision. The circuit court affirmed the Board's decision in a written order entered on September 20, 2012. Plaintiff timely appealed to this court.

¶ 10 On appeal, plaintiff argues the Board's decision should be reversed. Plaintiff maintains she is entitled to receive benefits under section 3-112(a) of the Code in that she was married to Officer Stephens at the time he began to receive his retirement benefits. She argues her status as Officer Stephen's wife at the time of his retirement gives her the rights of a "beneficiary" under section 3-101 of the Code. 40 ILCS 5/3-101 (West Supp. 2011). Section 3-148 of the Code provides that our review of the Board's final administrative decision is governed by the Administrative Review Law. 40 ILCS 5/3-148 (West Supp. 2011). "In administrative cases, our role is to review the decision of the administrative agency, not the determination of the circuit court." *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2006).

¶ 11 "The applicable standard of review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law." *American Federation of State, County and Municipal Employees, Council 31 v. Illinois State Labor Relations Board*, 216 Ill. 2d 569, 577 (2005). Specifically, it is well established that an agency's findings and conclusions of fact are deemed to be *prima facie* true and correct and overturned only if they are against the manifest weight of the evidence. *City of Sandwich v. Illinois Labor Relations Board*, 406 Ill. App. 3d 1006, 1008 (2011) (citing *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008)). Moreover, it is clear that a question of law—such as the proper interpretation of a statute-is to be reviewed *de novo. Id.* Our supreme court has described this type of review as " 'independent and not deferential.' " *Hossfeld v. Illinois State Board of Elections*, 238 Ill. 2d 418, 423 (2010) (quoting *Cinkus*, 228 Ill. 2d at 210).

¶ 12 Finally, it has been established that a "clearly erroneous" standard of review is to be applied to mixed questions of law and fact. *City of Sandwich*, 406 Ill. App. 3d at 1008. Mixed

questions of law and fact are "questions in which the historical facts are admitted or established, the rule of law is *undisputed,* and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." (Emphasis added.) (Internal quotation marks omitted). *Cinkus,* 228 Ill. 2d at 211 (quoting *American Federation of State, County and Municipal Employees, Council 31,* 216 Ill. 2d at 577). An agency's decision is "clearly erroneous" when the reviewing court is left with a firm and definite conviction that the agency has committed a mistake. *City of Sandwich,* 406 Ill. App. 3d at 1008. However, "where the historical facts are admitted or established, but there is a *dispute* as to whether the governing legal provisions were interpreted correctly by the administrative body, the case presents a purely legal question for which our review is *de novo.*" (Emphasis added.) *Goodman v. Ward,* 241 Ill. 2d 398, 406 (2011). Our supreme court has "acknowledge[d] that the distinction between these three different standards of review has not always been apparent in [its] case law." *Cinkus,* 228 Ill. 2d at 211; see also Kathleen L. Coles, *Mixed Up Questions of Fact and Law: Illinois Standards of Appellate Review in Civil Cases Following the 1997 Amendment to Supreme Court Rule 341,* 28 S. Ill. U.L.J. 13 (2003).

¶ 13 While the underlying central facts are not in dispute in this case, the parties do dispute the Board's interpretation of the relevant provisions of the Code. As such, and pursuant to our supreme court's decision in *Goodman,* our review must be *de novo.*

¶ 14 The only remaining question is what deference, if any, we should give to the Board's interpretation of the Code in conducting such a *de novo* review. Despite the fact that our *de novo* review is independent and not deferential, in *Provena Covenant Medical Center v. Department of Revenue,* 236 Ill. 2d 368 (2010) (plurality op.)), our supreme court specifically noted that

"[e]ven where review is *de novo,* an agency's construction is entitled to substantial weight and deference. Courts accord such deference in recognition of the fact that agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent." *Id.* at 387, n. 9.

¶ 15 While this pronouncement is couched in somewhat broad terms, we note that historically our supreme court has only afforded deference to an administrative agency's interpretation of an *ambiguous* statute. *Abrahamson v. Illinois Department of Professional Regulation,* 153 Ill. 2d 76, 97-98 (1992); *Boaden v. Department of Law Enforcement,* 171 Ill. 2d 230, 239 (1996); *Hadley v. Illinois Department of Corrections,* 224 Ill. 2d 365, 370 (2007). Furthermore, even if some deference is to be afforded to the Department's statutory interpretations, our supreme court has consistently indicated that "[a]n agency's interpretation is not binding, however, and will be rejected when it is erroneous." *Shields v. Judges' Retirement System of Illinois,* 204 Ill. 2d 488, 492 (2003); *Hadley,* 224 Ill. 2d at 371 (same). As such, while we will consider the Board's statutory interpretations in this case, we remain free to reject any that we find unreasonable or otherwise erroneous.

¶ 16 Article 3 of the Code covers the establishment and administration of police pension funds for the municipalities with no more than 500,000 habitants. 40 ILCS 5/3-101 through 5/3-152 (West Supp. 2011)). We must construe the provisions of the Code liberally in favor of the rights of an applicant. *Johnson v. Retirement Board of the Policemen's Annuity and Benefit Fund,* 114 Ill. 2d 518, 521 (1986). At issue in this case is the meaning of section 3-112(a) of the Code which provides:

> "Upon the death of a police officer entitled to a pension under Section 3-111, the surviving spouse shall be entitled to the pension to which the police officer was then entitled. Upon the death of the surviving spouse, or upon the remarriage of the surviving spouse if that remarriage terminates the surviving spouse's eligibility under Section 3-121, the police officer's unmarried children who are under age 18 or who are dependent because of physical or mental disability shall be entitled to equal shares of such pension. If there is no eligible surviving spouse and no eligible child, the dependent parent or parents of the officer shall be entitled to receive or share such pension until their death or marriage or remarriage after the death of the police officer." 40 ILCS 5/3-112(a) (West Supp. 2011).

¶ 17 The primary rule of statutory interpretation "to which all other canons and rules are subordinate, is to ascertain and give effect to the intent of the legislature." *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 509-10 (2007) (citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 64 (2004)). "The language of a statute is generally considered to be the most reliable indication of the legislature's objectives in enacting that particular law." *Wade*, 226 Ill. 2d at 511 (citing *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006)).

¶ 18 Section 3-112(a) is clear that it provides survivor benefits upon the death of a police officer to a "surviving spouse." Under this language, plaintiff would be entitled to the recovery of benefits if, at the time of Officer Stephen's death, she survived him as his spouse. It is uncontroverted that, at the time of Officer Stephen's death, he was divorced from plaintiff and, therefore, plaintiff was not his surviving spouse.

¶ 19 Plaintiff argues section 3-101 compels a different reading of section 3-112(a) of the Code. Section 3-101 does state that the police pension fund must be established and administrated for the benefit of the officers, their surviving spouses, and children. This overall policy language is not disregarded by our interpretation of the plain language of section 3-112(a).

¶ 20 The decision in *In re Marriage of Hannon*, 207 Ill. App. 3d 329 (1991), supports our reading of section 3-112(a). The respondent in *Marriage of Hannon* was married to the petitioner, a member of the City of Aurora Firefighter's Pension Fund. They were divorced on February 8, 1989, and, at that time, the petitioner was retired and receiving retirement benefits. *Id*. at 331. The dissolution judgment included an agreed "Qualified Domestic Relations Order" (QDRO), which provided the respondent would receive 50% of the petitioner's pension benefits directly from the pension fund. *Id*. After the pension fund intervened in the case, the QDRO was modified to provide the respondent was not entitled to survivor's benefits under the Code. *Id*. at 331-32. On appeal, the court considered the language of section 4-114(a) of the Code, which provided for survival benefits to a "surviving spouse." *Id*. at 333. The court held:

> "As the Fund correctly notes, an unambiguous statute shall be construed consistent with the ordinary and popularly understood meanings of its words. [Citation.] Given that fact, and the absence of any contrary suggestion in the legislative language, we find inescapably clear that section 4-114(a)'s reference to a 'surviving spouse' includes only a person who is married to a pensioner and alive at the time of the pensioner's death. [Citation.] A former spouse, having had his marital relationship severed by dissolution, is not included in that designation. [Citation.]" *Id.* at 333.

See also *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 11 (divorced spouse not "surviving spouse" under section 17-121(a) of the Code).

¶ 21 Plaintiff argues that she is entitled to surviving spouse benefits because those benefits accrued when Officer Stephens retired during the time of their marriage. A similar argument was considered and rejected by the court in *Marriage of Hannon* in this way:

> "Unlike retirement pension rights, which the courts clearly recognize as distributable marital property [citation], survivor pension rights are not generally defined as the property of the covered employee [citation]. Rather, they are generally defined under the Code as the property of the survivors of a deceased former employee [citation]. Thus, they arise only upon the death of a pensioner, and, in the case of 'surviving spouse' rights, they accrue to the spouse at the time of the employee's death." *Marriage of Hannon*, 207 Ill. App. 3d at 334-35.

¶ 22 Plaintiff contends the Board should read section 3-112(a) in conjunction with section 3-121 of the Code. 40 ILCS 5/3-121 (West Supp. 2011). Section 3-121, however, relates to the remarriage of a surviving spouse. We find section 3-121 does not apply to this case and has no factual relevance to an interpretation of section 3-112(a). Furthermore, we are not required to look to other provisions of the Code when there is no ambiguity in the statutory language at issue here. See *Marriage of Hannon*, 207 Ill. App. 3d at 334 (rejecting suggestion to look at the Code as a whole when interpreting an unambiguous provision).

¶ 23 Before the Board, and on administrative review before the circuit court, plaintiff raised various additional arguments, including: (1) under section 1055(a) of the Employee Retirement Income Security Act (ERISA) (29 U.S.C.A. § 1055 (eff. July 6, 2012)), survivor benefits belong

to the spouse even after divorce, unless the spouse consents otherwise; (2) the Nevada divorce decree requires the payment of benefits to plaintiff, even after the death of Officer Stephens; and (3) section 401(a)(9) of the Internal Revenue Code relating to "designated beneficiary" supports her position that she is entitled to survival benefits. Plaintiff has waived these arguments on appeal for failure to raise them in her brief. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

Nonetheless, we do note the ERISA does not apply to a government benefit plan, such as the one here. See 29 U.S.C.A. § 1003(b)(1) (eff. March 9, 2002); § 1002(32) (eff. Dec. 23, 2008). Additionally, the divorce decrees in Nevada required Officer Stephens to make payments of a percentage of his *retirement* benefits to plaintiff, but did not bind the Fund to make any payments to plaintiff and certainly did not override the clear statutory language as to *survivor* benefits in section 3-112(a). As stated in *Marriage of Hannon*, survivor benefits are statutorily designated and not controlled by the employee and not subject to division as marital property. *Marriage of Hannon*, 207 Ill. App. 3d at 334-35. Finally, in *Marriage of Hannon*, we found the Internal Revenue Code does not preempt the Code. *Id*. at 336.

¶ 24 We hold the Board did not err in its interpretation of section 3-112(a), and its denial of survivor benefits to plaintiff who was not married to Officer Stephens at the time of his death.

¶ 25 For the foregoing reasons, the judgment of the circuit court is affirmed, and the Board's administrative decision is confirmed.

¶ 26 Circuit court affirmed; Board's decision confirmed.