No. 125330

IN THE SUPREME COURT OF ILLINOIS

WILLIAMSON COUNTY BOARD OF COMMISSIONERS, a body politic and Corporate; ROBERT GENTRY; RONALD M. ELLIS, and JAMES D. MARLO,	)	On Appeal from the First Judicial Circuit, Williamson County
Plaintiffs-Appellees,	)	Circuit Court Case No.: 18MR215
vs.	)	Honorable Jeffrey Goffinet, Judge Presiding
BOARD OF TRUSTEES OF THE ILLINOIS MUNICIPAL RETIREMENT FUND, et al.	)	
Defendants-Appellants.	)	

REPLY BRIEF OF THE DEFENDANTS-APPELLANTS

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ORAL ARGUMENT REQUESTED

ARGUMENT

Section 7-137.2(a) of the Illinois Pension Code requires a county board to adopt a resolution, within 90 days of a general election in which a county board member is elected, certifying to IMRF that the position of elected county board member is expected to work at least the applicable hourly standard. 40 ILCS 5/7-137.2(a). Where a county board chose not to certify that the position of county board member required the necessary hours for IMRF participation, any person holding the position would no longer be eligible for IMRF participation. *Id.* Plaintiffs contend that the adoption of Section 7-137.2(a) unconstitutionally terminated their IMRF participation notwithstanding the Williamson County Board's choice not to certify the position of elected county board members as eligible for IMRF participation.

The Plaintiffs' contention is premised on two primary arguments. First, Plaintiffs argue that prior to the adoption of Section 7-137.2(a), Plaintiffs were qualified participants of IMRF. Second, Plaintiffs argue that the effect of Section 7-137.2(a) was the termination of their IMRF participation, thereby violating the pension protection clause of the Illinois Constitution. The IMRF Defendants agree with Plaintiffs' first argument: the Plaintiffs previously participated in IMRF while holding a position which normally required sufficient hours for IMRF participation. However, the facts and timeline in the record do not support Plaintiffs' second argument. The portion of P.A. 99-900 at issue in this case, Section 7-137.2(a), did not have the effect of terminating Plaintiffs' participation in IMRF where their participation continued until after the Williamson County Board failed to certify the county board members' eligibility for IMRF participation.

Section 7-137.2(b) did not change Plaintiffs' substantive rights to IMRF participation. Plaintiffs continue to have a constitutionally protected right to participate in IMRF while they serve in an office normally requiring the performance of duty in excess of 1000 hours. Nonetheless, the General Assembly properly exercised its authority to adopt a new process for verifying whether a position normally requires the performance of duty for sufficient hours to legally qualify for IMRF participation. The pension protection clause does not preclude the General Assembly (or an administrative agency) from implementing a reasonable process for certifying compliance with the existing requirements of the Illinois Pension Code. It was not the effect of Section 7-137.2(b) to diminish or impair the Plaintiffs' pension benefits; therefore, the constitutionality of Section 7-137.2(b) must be affirmed.

1. **Plaintiffs' constitutionally protected right to IMRF participation was not changed by Section 7-137.2(a).**

Prior to the adoption of Section 7-137.2(a), the Plaintiffs were entitled to IMRF participation so long as they held an employment position or elected office the job duties of which were normally expected to exceed the hourly standard. Section 7-137.2(a) did not change this eligibility requirement. Plaintiffs' constitutionally protected right to participate in IMRF and accrue service credit has never extended to a position that was not normally expected to require more than 1000 hours per year.

Plaintiffs, however, argue for a much broader application of the pension protection clause. Plaintiffs contend that because they each were qualified participants in IMRF in their capacities as Williamson County Board Commissioners, they had a constitutionally protected right to continued participation in the Fund until their retirement. Pl. Br. p. 14. This Court has previously read the pension protection clause as

"defining the range of protected benefits broadly to encompass those attendant to membership in the State's retirement systems." *Kanerva v. Weems*, 2014 IL 115811 ¶ 41. IMRF certainly agrees that participation in a pension fund while in a qualified position is the sort of benefit that the pension protection clause was intended to protect. IMRF disagrees with the Plaintiffs' premise that once a person qualifies for IMRF participation, that person is indefinitely entitled to continue participation notwithstanding subsequent changes to the qualification of an eligible position.

Plaintiffs' concede that there are certain disqualifying events that permit termination of a pension participation. For example, the Plaintiffs agree that the forfeiture of a public pension based on a job related felony comports with the pension protection clause even though it terminates an otherwise constitutionally protected benefit. Pl. Br. p. 9, *citing Kerner v. State Employee's Ret. System*, 72 Ill. 2d 507, 514. However, Plaintiffs' attempt to distinguish the facts of *Kerner* and the instant case because the felony forfeiture provision existed in the statute when Kerner became a member of the pension system whereas Section 7-132.2(a) of the Pension Code did not exist when the individual Plaintiffs in this case joined IMRF. Pl. Br. p. 9. Plaintiffs ignore the fact that Article 7 of the Illinois Pension Code, since its inception, has excluded from participation anyone in a position which did not meet the applicable hourly standard. 40 ILCS 5/7-137(b)(1). A position that once qualified for participation may no longer qualify and alternatively a position that once qualified may no longer qualify.

This Court has acknowledged that changes in a public employee's terms and conditions of employment by his or her public employer are not a violation of the pension protection clause, notwithstanding the fact that such changes can have a significant

impact on an employee's pension benefits. For example, in *Peters v. City of Springfield*, the City adopted an ordinance reducing the mandatory retirement age for its police officers and firefighters from 63 to 60. 57 Ill. 2d 142, 144 (1974). Several police officers and firefighters over the age of 60 sued to enjoin the effect of the ordinance based on the pension protection clause. *Id.* The officers argued that by requiring retirement, they could not accrue additional years of service and thereby could not increase the value of their pension. *Id.* This Court concluded that the ordinance did not violate the pension protection clause and acknowledged that "[m]unicipal employment is not static and a number of factors might require that a public position be abolished, its functions changed, or the terms of employment modified." *Id*. at 151.

The *Peters* decision stands for the proposition that a public employer is not required to maintain static job duties for its employees simply because such employees had previously qualified for participation in a pension fund. By adopting the mandatory retirement age ordinance, the City of Springfield communicated to its respective police and firefighter pension funds that those individuals over the age of 60 were no longer eligible to accrue additional service credit because they were no longer eligible for a position which qualified for the pension funds. As this Court noted, a public position could be eliminated which would invariably cease the person's participation in a pension fund. Similarly, an employer could reduce an individual's salary thereby communicating a reduced final rate of pensionable earnings to the relevant pension fund. Each of these changes would reduce or eliminate a person's pension benefit but would not violate their constitutionally protected right to pension participation.

Although Section 7-137.2(a) did not change the terms and conditions of any employment position, the new language recognizes that elected office too "is not static" and a number of factors could require that its functions change over time. Thus, Section 7-137.2(a) created the mechanism by which county employers would communicate to IMRF whether the expected duties of an elected county board member continued to meet the eligibility requirements set forth in the Illinois Pension Code. Section 7-137.2(a) did not create any new or remove any existing eligibility requirements for IMRF participation. Both before and after the enactment of Section 7-137.2(a), a person serving as an elected county board member could only participate in IMRF if (1) the position normally required the performance of duty in excess of the applicable hourly standard; and (2) if the person holding the position opted to participate. Although Section 7-137.2(a) did not substantively change the first requirement, it specified the process by which a county employer was to certify the first requirement to IMRF.

As such, Section 7-137.2(a) did not alter the Plaintiffs' substantive rights to IMRF participation. Rather, the new language enacted a procedural change for the certification of existing substantive requirements. IMRF is not aware of any legal authority which has invalidated a procedural update to the Illinois Pension Code based on the pension protection clause. Indeed, IMRF, as an administrative agency, routinely amends its administrative processes to provide for the efficient administration of the pension fund in accordance with the terms of the Illinois Pension Code. Surely, the General Assembly has the same or greater authority to implement process changes. Neither the Plaintiffs nor the Circuit Court cite any legal authority which would preclude the General Assembly from

adopting procedural changes to the Illinois Pension Code where those changes do not alter substantive rights.

In sum, the Illinois Pension Code has never authorized Plaintiffs to accrue IMRF service credit in a position that did not qualify for IMRF participation. Section 7-137.2(a) did not create a new exclusion for non-qualifying positions, it merely created a process for county employers to certify the eligibility of elected county board members. Because the same exclusions of non-qualifying positions applied before and after the adoption of Section 7-137.2(a), the Plaintiffs' rights to IMRF participation were not changed.

2. Since its inception, IMRF has always had the statutory authority to request information from its participating employers, including Williamson County.

IMRF has the powers and duties granted to it under the Pension Code. 40 ILCS 5/7-198. One of these powers, is "the making of administrative decisions on participation and coverage" in the Fund. 40 ILCS 5/7-200. In order to make well-informed decisions, the legislature further provided IMRF with the authority to "request such information from any participating or covered employee or from any participating or covered municipality . . . as is necessary for the proper operation of the Fund." 40 ILCS 5/7-183. Plaintiffs concede that IMRF has this authority and cite with approval the fact that Williamson County had previously complied with IMRF's request for information by adopting a resolution certifying the eligibility of its county board members pursuant to IMRF's 1968 Board Resolution. Pl. Br. p. 4.

However, Plaintiffs seem to argue that once IMRF has requested information and the employer has provided a response, that response is set in stone and created a constitutionally protected benefit. Notwithstanding the apparent fact that positions change over time, the Plaintiffs advocate for an application of the pension protection clause

which would bind IMRF and the legislature to past representations by participating employers, even if such representations were made decades earlier.

Plaintiffs cite to IMRF's 1968 administrative rule because Williamson County properly complied with the certification process created by the administrative rule. Plaintiffs do not offer any legal authority which would provide that the legislature has less authority than IMRF to enact a procedure for certifying pension fund eligibility. Under IMRF's authority to request information pursuant to Section 7-183, it could have requested Williamson County or any other participating employer to certify the eligibility of its elected officials. It would be reasonable for IMRF to set a deadline for complying with such a request for information because setting reasonable deadlines allows IMRF to efficiently administer the Fund. Presumably, the Plaintiffs would not dispute that IMRF has the authority to request such information and has had such authority throughout the Plaintiffs' membership in the Fund. Even so, the Plaintiffs maintain that the legislature had less authority to create a process for requesting information within a particular deadline. Plaintiffs do not cite to, and IMRF is not aware of any, legal authority finding that the legislature who writes IMRF's enabling legislation has less authority than IMRF as an administrative agency. This Court should find that the enactment of Section 7-137.2(a) was a proper exercise of the legislature's authority to update the procedures for requesting certain information from IMRF participating employers.

3. The effect of Section 7-137.2(a) was the creation of a new process for certifying whether the position of elected county board member requires a sufficient number of annual hours to qualify for IMRF participation.

Unlike all of the cases relied upon by Plaintiffs, the legislation at issue did not diminish nor impair the Plaintiffs' pension benefits. Section 7-137.2(a) did not terminate Plaintiffs' participation in IMRF. If the legislature intended to change the Plaintiffs'

substantive pension rights, it could have done so. Instead, the legislature created a mechanism by which a county employer was to certify to IMRF whether the position of elected county board member required sufficient hours to qualify for IMRF participation. Section 7-137.2(a) requires action or inaction by an IMRF employer in order to have any effect.

a. The General Assembly was aware of its authority for changing substantive pension rights when it prospectively excluded individuals who were newly elected into county board member positions.

Although only Section 7-137.2(a) is at issue in this appeal, P.A. 99-900 contained other changes to the Illinois Pension Code. One of those changes was the newly added language contained in Section 7-137(b)(2.6) which provides:

> (b) The following described persons shall not be considered participating employees eligible for benefits from this fund . . .
>
> * * *
>
> 2.6. Any person who is an elected member of a county board and is first so elected on or after the effective date of this amendatory Act of the 99th General Assembly.

40 ILCS 5/7-137(b)(2.6). The legislature terminated the IMRF eligibility of all elected members of a county board elected after the effective date of P.A. 99-900. Unlike Section 7-137.2(a), there was no mechanism for an employer to make a newly elected county board member eligible for IMRF participation. The legislature affirmatively removed the substantive right of future IMRF participation for elected county board members. The legislature was aware of the protections contained in the pension protection clause because the substantive termination of rights only had prospective application to county board members elected after Section 7-137(b)(2.6) became law. Section 7-137.2(a), on the other hand, permitted existing county board participants to continue participating in

IMRF so long as they continued to meet the eligibility requirements that had always existed in the Illinois Pension Code.

b. By its inaction, the Williamson County Board of Commissioners informed IMRF that it no longer expects the position of elected county board member to require at least 1000 hours per year.

As of February 6, 2017, Williamson County, by its failure to certify the eligibility of its elected county board members, informed IMRF that the position of county board member did not normally require the performance of duty in excess of 1000 hours per year. Plaintiffs argue that IMRF has never alleged that the individual plaintiffs have failed to provide 1000 hours of annual public service; therefore, the position must be a qualifying position. Pl. Br. p. 4. Whether the individuals in the position of county board member actually work 1000 hours per year is irrelevant because the IMRF eligibility standard is based on the employer's expectation of the normal job duties for the position. *See* 40 ILCS 5/7-137(b)(1) (excluding from IMRF participation "[a]ny person who occupies an office . . . *normally requiring the performance of duty* less than" the hourly standard) (emphasis added). The distinction between actual hours worked and the normal requirements of a position is particularly relevant for elected positions where someone holding the position can work as much or as little as that person deems necessary. There is no employment authority monitoring daily job duties. Only the voters can remove an elected official who is dedicating too much or not enough hours to provide the public service for which he or she is elected. Where one county board member may dedicate 100 hours per year to the position, another may dedicate 2000 hours per year to the same position. The relevant question for IMRF participation, however, is whether the normal expectation of the job duties requires at least 1000 hours. 40 ILCS 5/7-137(b)(1).

The variability of actual hours worked by elected officials is precisely the reason that IMRF originally enacted administrative rules in 1968 requiring the governing body of a participating employer to certify whether certain elected *positions* normally require sufficient hours to qualify for IMRF participation. *See* IMRF Board Resolution 1968-7273 *available at* https://www.imrf.org/en/about-imrf/board-resolutions/eligibility/br-1968-7273. A person holding an elected position which normally requires 500 hours of work per year cannot transform the position into an IMRF qualifying position simply by spending more time at the office. Therefore, the relevant inquiry is not whether the individual Plaintiffs have worked more than 1000 hours in their position as county board member in any given year; the relevant inquiry is whether the governing board expects the position of county board member to require more than 1000 hours of work annually.

The Williamson County Board had an affirmative duty to provide the necessary certification within 90 days of a general election. When it failed to do so, Williamson County informed IMRF that it did not expect the position of elected county board member to require sufficient hours to qualify for IMRF participation. Additional employee staffing may have reduced the day-to-day job duties of the board members. Technological advancements may have increased productivity to the point where fewer hours were necessary to accomplish the same work. The job duties could have changed for a variety of reasons since the last time a county board evaluated the position. After re-evaluating the job duties of the position of elected county board member, counties throughout the State chose to let their prior certification expire pursuant to the terms of Section 7-137.2(a). Thus, under the process for certifying the eligibility of county board positions set forth by the legislature in Section 7-137.2(a), the Williamson County Board

of Commissioners notified IMRF that it did not expect the position of elected county board member to require sufficient hours of work to qualify for IMRF participation. It was this communication through the Williamson County Board's inaction, not the adoption of P.A. 99-900, which had the effect of terminating the Plaintiffs' participation in IMRF.

CONCLUSION

For the foregoing reasons and the reasons stated in the Opening Brief of the Defendants-Appellants IMRF Board of Trustees, it is submitted that Section 7-137.2(a) as enacted by P.A. 99-900 does not violate the pension protection clause of the Illinois Constitution where it does not diminish or impair a pension benefit entitled to constitutional protection. Section 7-137.2(a) created a procedure by which participating county employers were required to provide information that they had always been required to provide—whether a particular position required sufficient hours of work to qualify for IMRF participation. The fact that the General Assembly imposed a different process than had been in place in the past did not alter the Plaintiffs' substantive rights to IMRF participation. The General Assembly's authority to amend procedures within the Pension Code must be the same, if not greater, than IMRF's authority as the administrative agency charged with the efficient administration of the Fund.

P.A. 99-900 did not cause the Plaintiffs to be terminated from IMRF participation. Williamson County's failure to certify the continued eligibility of the position of elected county board member caused the Plaintiffs to lose their IMRF eligibility. Therefore, this Court should affirm the constitutionality of P.A. 99-900 and affirm the IMRF final

administrative decision terminating the Plaintiffs' participation in the Fund for failure to comply with Section 7-137.2(a).

Respectfully submitted,

ILLINOIS MUNICIPAL RETIREMENT FUND BOARD OF TRUSTEES,

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BOARD OF TRUSTEES OF THE ILLINOIS MUNICIPAL RETIREMENT FUND, et al.	)	
Defendants-Appellants.	)	

NOTICE OF FILING

To: See attached service list

PLEASE TAKE NOTICE that on February 24, 2020, I caused to be electronically filed the attached Reply Brief of Defendants-Appellants and this Notice of Filing with the Clerk of the Supreme Court of Illinois through the Odyssey eFileIL electronic filing service provider, a copy of which is attached hereto and served upon you.

Respectfully submitted,

Board of Trustees of the Illinois Municipal Retirement Fund

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CERTIFICATE OF SERVICE

I, Vladimir Shuliga, Jr., hereby certify under penalties of perjury as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that the statements set forth in this instrument are true and correct and that I caused a copy of the attached Reply Brief of Defendants-Appellants and this Notice of Filing to be served upon the counsel of record listed below by service through the Odyssey eFileIL electronic service provider and by electronic mail to each email address listed below before 5:00 pm on February 24, 2020.

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342 (a), is twelve (12) pages.

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