

Nos. 127527 and 127594 (cons.)

**IN THE
SUPREME COURT OF ILLINOIS**

John O'Connell,)	
)	
Plaintiff-Appellee,)	Petition for Leave to Appeal from
)	the Appellate Court of Illinois
)	First Judicial District
v.)	No. 1-20-1031
)	
Cook County and Board of Trustees)	There Heard on Appeal from
of the County Employees' and)	The Circuit Court of Cook County,
Officers' Annuity and Benefit Fund)	No. 20-CH-288
of Cook County,)	
)	Honorable Neil H. Cohen,
Defendants-Appellants.)	Judge Presiding

**REPLY BRIEF OF DEFENDANT-APPELLANT
BOARD OF TRUSTEES OF THE COUNTY EMPLOYEES' AND OFFICERS'
ANNUITY AND BENEFIT FUND OF COOK COUNTY**

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

Plaintiff-Appellee O’Connell’s (“O’Connell”) request for a continuation of his ordinary disability benefits from the County Employees’ and Officers’ Annuity and Benefit Fund of Cook County (the “Fund”) was properly denied by Defendant-Appellant, the Retirement Board (“Board”) of the Fund, because it is undisputed that O’Connell was not an employee with Defendant—Appellant Cook County (the “County”). The plain language of Section 9-157 of the Illinois Pension Code (40 ILCS 5/9-157) clearly illustrates the legislature’s intent that only individuals that are employees of the County would be entitled to ordinary disability benefits while they were employees. The benefit was never intended to subsidize those who are not employed by the County. The Board’s denial of O’Connell’s request to continue his ordinary disability benefits post termination from employment is clearly consistent with the legislative intent in authorizing ordinary disability benefits under Article 9.

The brief filed by O’Connell repeats the same two arguments he has asserted throughout the proceedings of this case: (i) the plain language of Article 9 and the definition of “employee” entitles him to the disability benefits he seeks as a former employee; and (ii) the Appellate Court’s decision granting O’Connell the disability benefits he seeks as a former employee is consistent with *Di Falco v. Board of Trustees of the Firemen’s Pension Fund of Wood Dale Fire Protection Dist. No. One.*, 122 Ill. 2d 22 (1988) and *DiFiore v. Retirement Board of Policemen’s Annuity and Benefit Fund of the City of Chicago*, 313 Ill. App. 3d 546 (1st Dist. 2000).

ARGUMENT

A. O’CONNELL MISCONSTRUES THE PLAIN LANGUAGE OF SECTION 9-157 OF THE PENSION CODE.

First, it is important to re-iterate that the Board did not terminate O’Connell from County employment; the County did. An employer and a pension board are two separate entities. See *Dowrick v. Village of Downers Grove*, 362 Ill. App. 3d 512, 518-21 (2005); *Rhoads v. Board of Trustees of the City of Calumet City Policemen’s Pension Fund*, 293 Ill. App. 3d 1070 (1075 (1997) (a municipality’s police pension fund is not in privity with the municipality itself). In this case, once the decision was made by the County to terminate O’Connell’s employment, the Board had no alternative but to deny O’Connell’s request to continue his ordinary disability benefits.

The Board’s decision with respect to O’Connell is based on the plain language of Section 9-157 of the Pension Code. That Section is unambiguous and provides that only individuals that are *employees* of the County are entitled to ordinary disability benefits *while* they are employees. 40 ILCS 5/9-157. Additionally, the language of Section 9-108(a) plainly states that benefits under Article 9 are to be paid to “...any *employee* of the county *employed* in any position in the classified civil service of the county...” 40 ILCS 5/9-108(a) (emphasis added). In applying plain and unambiguous language, it is not necessary for a court to search for any subtle or not readily apparent intention of the legislative. *Envirite Corp. v. Illinois Environmental Protection Agency*, 158 Ill. 2d 210, 217 (1994). Here, there is no question that the legislature intended that ordinary disability benefits be paid only to those persons currently employed by Cook County.

O’Connell argues, without any support, that the legislature intended to include “former employees” in its definitions under Section 9-108. O’Connell urges this Court to

apply the plain language of Article 9 but Section 9-108 lacks any language or impression indicating that the legislature intended to define “employee” to include persons who were formerly employed by Cook County. Indeed, if the legislature had wanted to include “former employees” in its definitions in Article 9, it could easily have done so as it did in other Articles of the Pension Code. O’Connell alleges that the Board is urging this Court to interpret “employee” in Article 9 based on the definition of “Fireman” in Article 6 and that such argument is mis-placed. That is simply not the case. The Board is simply noting that when the legislature intends to grant former employees with pension benefits, it expressly does so (i.e., the legislature defining “Fireman” as “any person who (a) was, is or shall be employed...” 40 ILCS 5/6/106 (emphasis added).

O’Connell is essentially arguing that the legislature’s use of the word “employed” in the definition of “employee” in Section 9-157 and 9-108(a) can only include “past, present and future” time-periods. If that is the holding in this case, such reasoning impacts nearly every Article of the Pension Code where the legislature used the term “employed”. For instance, Article 5 (governing City of Chicago policeman) defines an “active policeman” as a person “*employed* and receiving salary as a policeman”. 40 ILCS 5/5-112 (emphasis added). O’Connell’s logic that the legislature’s use of “employed” to encompass a past time-period is illogical when used in the context of the “active policeman” receiving a salary as noted under Section 5-112 of the Pension Code.

O’Connell fails to address how the inclusion of former employees in the definition of an employee is completely at odds with the definition of “disability” in Article 9. Section 9-113 defines “disability” as: “[a] physical or mental incapacity as the result of which *an employee* is unable to perform the duties of his position.” 40 ILCS 5/9-113

(emphasis added). Obviously, former employees cannot be found to be unable to perform the duties of their position since they are no longer employed. Section 9-113 reinforces that a person must be employed by the County in order to be eligible for and to ultimately receive disability benefits. Once O'Connell's employment was terminated by the County, he was no longer eligible to receive ordinary disability benefits. To hold otherwise and require the Board to interpret the language of Article 9 in the manner that the appellate court orders would result in the Board acting beyond its authority granted by statute. *Rosler v. Morton Grove Police Pension Fund*, 178 Ill. App. 3d 769 (1st Dist. 1989).

O'Connell also stresses that because termination from employment is not a "benefit-terminating event" listed in Sections 9-157 and 9-159, the Board lacks the authority to terminate O'Connell ordinary disability benefit. Again, O'Connell misses the mark in alleging that those are the "only events that trigger termination". For instance, O'Connell's disability benefits would also be subject to termination in the event he was convicted of a felony related to his employment ("*[n]*one of the benefits provided 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 an employee" (emphasis added) 40 ILCS 5/9-235). There is no reason for the legislature to include felony forfeiture as an additional event resulting in termination of benefits because it is addressed in the felony forfeiture section of Article 9. Similarly, there is no reason for the legislature to include termination of employment as an additional event resulting in termination of benefits because being an employee is an eligibility requirement in the first instance, as evidenced in the use of the term "employee" in Section 9-113. It would be redundant and surplusage for termination of employment to be included as another event requiring cessation of the benefit.

B. CONTRARY TO OTHER ARTICLES OF THE CODE, THE LEGISLATURE SPECIFICALLY OMITTED THE CONTINUATION OF ORDINARY DISABILITY BENEFITS POST-EMPLOYMENT IN ARTICLE 9.

When the legislature uses certain language in one part of a statute (i.e., Article 3—containing the express provision for the continuation of ordinary disability benefits post-employment) and different language in another part, we assume that different meanings were intended. *People v. Davis*, 2012 IL App (2d) 100934, ¶14, 968 N.E.2d 682; *Gutraj v. Bd. Of Trustees of Police Pension Fund of Vill. Of Grayslake, Illinois*, 2013 IL App (2d) 121163, ¶8, 992 N.E.2d 605, 607. O’Connell alleges that this Court is limited in its analysis to the express provisions of Article 9 and this Court should not be swayed by the express provision for the continuation of ordinary disability benefits post-employment in Article 3 of the Pension Code. 40 ILCS 5/3-114.2. O’Connell further argues that the decision cited by the Board in *DiFiore v. Retirement Bd. of Policemen’s Annuity and Ben. Fund of City of Chicago*, 313 Ill. App. 3d 546 (1st Dist. 2000) does not support a “requirement that the governing article of the Pension Code have an ‘express declaration for the continuation of benefits’” and that the “complicated” *DiFiore* decision does not bear “any resemblance to this case”. O’Connell is asking this Court to disregard the rationale for the holding in the *DiFiore* case, namely, that because there was no provision in Article 5 that allowed the plaintiff to receive ordinary disability benefits after he retires, in stark contrast to the provision in Article 3, the plaintiff was not entitled to ordinary disability benefits following his retirement (“...[t]here is no provision in article 5 that allows plaintiff to receive ordinary disability benefits after he retires. Therefore, because plaintiff’s pension rights are addressed by article 5, which does not specifically provide for the continuation of ordinary disability benefits upon retirement, we find the Board’s finding to be in error.” *Id.* at 550).

The statutory scheme is identical in this case—unlike Article 3, Article 9 does not specifically provide for the continuation of ordinary disability benefits upon retirement. The precedent in the *DiFiore* case provides that O’Connell is not entitled to ordinary disability benefits post-employment based on the language of Article 9.

CONCLUSION

For these reasons, the Retirement Board of the County Employees' and Officers' Annuity and Benefit Fund of Cook County respectfully request that this Court reverse the judgment of the Appellate Court of Illinois, First District.

Respectfully submitted,

THE RETIREMENT BOARD OF THE
COUNTY EMPLOYEES' AND
OFFICERS' ANNUITY AND BENEFIT
FUND OF COOK COUNTY AND EX
OFFICIO FOR THE FOREST PRESERVE
DISTRICT EMPLOYEES' ANNUITY
AND BENEFIT FUND OF COOK
COUNTY

By: /s/Sarah A. Boeckman
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CERTIFICATE OF COMPLIANCE

I certify that this foregoing Reply Brief of Defendant-Appellant Retirement Board of the County Employees' and Officers' Annuity and Benefit Fund of Cook County conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this Reply Brief of Defendant-Appellant, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents, statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the Petition under Rule 342(a) is 7 pages.

By:/s/Sarah A. Boeckman

CERTIFICATE OF FILING AND SERVICE

On March 11, 2022, I electronically filed the foregoing Reply Brief of Defendant-Appellant Board of Trustees of the County Employees' and Officers' Annuity and Benefit Fund of Cook County (the "Reply Brief") with the Clerk of the Supreme Court of Illinois, by using the Odyssey eFileIL system.

I served each party by emailing from the Firm the Reply Brief directly to its attorneys (as indicated below) on March 11, 2022:

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure (735 ILCS 5/1-109), I certify that to the best of my knowledge, information, and belief the statements in the Proof of Filing and Service are true and Correct.

By:/s/Sarah A. Boeckman

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)	Honorable Neil H. Cohen,
Defendants-Appellants.)	Judge Presiding

NOTICE OF FILING

TO: See Attached Proof of Service

PLEASE TAKE NOTICE that on March 11, 2022, we caused to be filed with the Supreme Court of Illinois, the Reply Brief of Defendant-Appellant Board of Trustees of the County Employees' and Officers' Annuity and Benefit Fund of Cook County, a copy of which is attached hereto and served upon you by operation of the Court's Odyssey electronic filing system.

Respectfully submitted,

Board of Trustees of the County Employees'
and Officers' Annuity and Benefit Fund of
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