Nos. 127527 and 127594 (cons.)

IN THE SUPREME COURT OF ILLINOIS

JOHN O'CONNELL,	)	Appeal from the
	)	Appellate Court of Illinois,
Plaintiff-Appellee,	)	First Judicial District,
	)	No. 1-20-1031
v.	)	
	)	
COOK COUNTY and the BOARD OF TRUSTEES OF THE COUNTY EMPLOYEES' AND OFFICERS' ANNUITY AND BENEFIT FUND OF COOK COUNTY,	)	There heard on appeal from the Circuit Court of Cook County No. 2020 CH 00288
	)	Honorable Neil H. Cohen,
Defendants-Appellants.	)	Judge Presiding

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NATURE OF THE CASE

Plaintiff-Appellee John O'Connell worked for Defendant Cook County (the "**County**") for 17 years, beginning in 1999, before he became permanently disabled due to multiple sclerosis. When his condition had deteriorated to the point that he could no longer work, he asked for and received leave from the County. He also asked for and received disability benefits from the other Defendant in this lawsuit, the Board of Trustees of the County Employees' and Officers' Annuity and Benefit Fund of Cook County (the "**Board**").

Starting in early 2017, the County placed O'Connell on disability leave and the Board paid his monthly disability benefits. The Board informed O'Connell that based on his years of service he would be entitled to ordinary disability benefits through August 2021.

On July 1, 2019, the County terminated O'Connell as an employee solely because he was unable to return to work due to his permanent disability. The same day, the Board stopped paying O'Connell disability benefits because he was no longer a current County employee.

O'Connell filed this suit, bringing claims under Article 9 of the Illinois Pension Code, 40 ILCS 5/9-101 *et seq.* ("**Article 9**"), and the Pension Clause of the Illinois Constitution, Ill. Const. 1970, art. XIII, § 5 (the "**Pension Clause**"), seeking the two-year remainder of the approximately four-and-a-half years of disability benefits that he had accrued under the Pension Code based on his more than 17 years of active service to the County, and other rights described

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in this brief. He also brought a claim under the Due Process Clause of the United States Constitution against the Board.

The Circuit Court dismissed O'Connell's complaint with prejudice. The Appellate Court reversed, concluding that O'Connell was entitled to continued disability benefits because he applied for and began to receive disability benefits while an active County employee, and Article 9 does not require continued employment for the continuation of earned disability benefits. *O'Connell v. County of Cook, et al.*, 2021 IL App (1st) 201031 ("Op.," A1-17).[1]

The Board's Brief incorrectly states that the Appellate Court reversed "the decision entered on administrative review in the Circuit Court of Cook County, Illinois, that affirmed the Board's decision to deny [O'Connell's] application for reinstatement of his ordinary disability benefits" and that "[n]o questions are raised on the pleadings." (Board Br. at 1.) The case before the Circuit Court was not "on administrative review" because the Board did not afford O'Connell any administrative process. It simply terminated his benefits, without a hearing, when the County terminated his employment.[2] The Board does not challenge the Appellate Court's reversal of the Circuit Court's dismissal of Count V, a due process claim against the Board. (Op. ¶¶ 34-35, A15-16.)

All issues are raised on the pleadings.

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1 Citations to "A__" are to the County's Appendix.

2 *See* Statement of Facts, below at pp. 4-9.

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ISSUE PRESENTED FOR REVIEW

Whether the Board and the County violated the Pension Code and the Pension Clause of the Illinois Constitution by terminating O'Connell's disability benefits, at a time when he had approximately two years remaining of his accrued disability benefits, because the County discharged him as an employee due to his permanent disability.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves Article 9 of the Illinois Pension Code, 40 ILCS 5/9-101 *et seq.*, and the Pension Clause of the Illinois Constitution, Ill. Const. 1970, art. XIII, § 5.

The text of Article 9 is found in the Appendix to the County's Brief, A278-389.

The Pension Clause provides that "[m]embership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Ill. Const. 1970, art. XIII, § 5.

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STATEMENT OF FACTS

I. The County and the Board Terminate O'Connell's Disability Benefits Because He Is Unable to Work Due to His Disability.

O'Connell began his employment with the County in 1999. When hired, he was required to become a participant in, and contribute to, the County Employees' and Officers' Annuity and Benefit Fund (the "**County Pension Fund**"). (Compl. ¶ 29, A150-51.) County employees are required to contribute a percentage of their salaries to the County Pension Fund every month.[3]

In 2001, while working full time for the County, O'Connell was diagnosed with multiple sclerosis. (Compl. ¶ 30, A151.) He continued to work with accommodations until the end of 2016, when his health had deteriorated to the point that he could no longer do so. (*Id.*)

In January 2017, O'Connell took leave from his position with the County and applied to the Board for the disability benefits that he was promised and had accrued under the Pension Code. *(Id.* ¶ 31, A151.) The Board granted his application for benefits. (*Id.* ¶ 7, A146.) Under the Board's rules, a disabled employee must periodically reapply for the continuation of disability benefits. O'Connell did so, and the Board approved all his subsequent applications for the continuation of benefits. (*Id.*) As part of that process, on May 2, 2019, the

[3] Employees make such payments by "the amounts deducted from the salaries of the employees." 40 ILCS 5/9-169(a). *See also Employee Contributions*, COOK COUNTY PENSION FUND, https://www.cookcountypension.com/employees/contributions (last visited February 17, 2022).

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Board granted his application for a continuation of disability benefits through November 30, 2019. (*Id.* ¶ 35, A151; Compl. Ex. A, A164.) A representative of the Board told O'Connell that based on his years of service with the County, he was eligible to receive disability benefits until approximately August 2021. (Compl. ¶ 7, A146.)

Two weeks later, on May 16, 2019, the County sent O'Connell a letter requiring that he provide medical documentation indicating his expected return-to-work date. (*Id.* ¶ 36, A152; Compl. Ex. B, A166.) The letter stated that if the requested documentation was not received by May 29, 2019, or if O'Connell was not medically released to return to work by that date, he would be "administratively separated." (*Id.*) O'Connell contacted the Board and was told that the Board would cease paying his disability benefits if the County terminated him. (Compl. ¶ 38, A152.) O'Connell explained to the County that he could not provide a return-to-work date because he is unable to work due to his permanent disability. (*Id.* ¶ 39, A152-53.) He asked the County to continue his employment status for the approximately two-year period in which he was eligible and entitled to receive disability benefits based on his years of service. (*Id.*) The County refused, disclaiming any role in the Board's administration of disability benefits, and the Board terminated O'Connell effective July 1, 2019. (*Id.* ¶¶ 40-41, A153.).

The County has not explained why it asked a permanently disabled employee to provide a return-to-work date. Nor has it explained why it

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continued O'Connell's employment status from January 2017 to May 2019, and then decided to impose a condition (return to work) that a permanently disabled individual could not meet.

After O'Connell's termination by the County, the Board—without giving O'Connell notice or an opportunity to object—stopped paying O'Connell's disability benefits. (*Id.* ¶ 42, A153.) At the same time, the County stopped making contributions to the County Pension Fund on O'Connell's behalf (the "County Contributions," discussed below in Argument Section I.B). Such contributions are required by the Pension Code as part of disability benefits. (*Id.* ¶ 43, A153.) In addition, because O'Connell's disability benefits were terminated before he reached the end of the disability-benefits eligibility period based on his years of service, he lost other benefits to which he was otherwise entitled under the Pension Code: the "Credit Purchase Option" and the "Early Annuity Option," discussed below in Argument Section I.B. (*Id.* ¶ 44, A153.)

On July 24, 2019, O'Connell, through counsel, sent Margaret Fahrenbach, the Board's Legal Advisor, a letter objecting to the termination of his accrued disability benefits and requesting their reinstatement. (*Id.* ¶ 45, A153-54.) Fahrenbach responded orally that the Board's position is that continued employment status is required for the continuation of disability benefits, but she added that outside counsel was reviewing O'Connell's request. Despite repeated requests over several months, the Board did not otherwise

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respond to O'Connell's request for reinstatement of his disability benefits. (*Id.*) The Board afforded O'Connell no process to contest the termination of benefits.

II. Proceedings In the Circuit Court and Appellate Court.

On January 9, 2020, O'Connell sued the Board and the County (collectively, "**Defendants**"), alleging that the termination of his disability benefits violates the Illinois Constitution, the Illinois Pension Code, and the Fourteenth Amendment of the United States Constitution. His complaint, in relevant part, included the following counts:

- Counts I (Declaratory Judgment) and III (Mandamus) seeking reinstatement of O'Connell's disability benefits because continued employment with the County is not required for the continuation of disability benefits. (Compl. ¶¶ 47-52, 57-62, A154-55, A158.)

- Count V, against only the Board, alleging a violation of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983, based on the Board's termination of O'Connell's disability benefits without due process. (*Id.* ¶¶ 70-73, A161.)[4]

The Board and the County filed separate motions to dismiss under 735 ILCS 5/2-619.1, invoking Sections 2-615 and 2-619. The Circuit Court granted both motions and dismissed the complaint with prejudice, holding that "employee" in Section 9-157 of the Pension Code refers only to current employees. In support, the Circuit Court misquoted the definition of

[4] In Counts II (Declaratory Judgment) and IV (Mandamus), pleaded in the alternative to Counts I and III, O'Connell sought reinstatement of his employment with the County if continued employment is required for him to continue to receive disability benefits, and reinstatement of his disability benefits. (Compl. ¶¶ 53-56, 63-69, A156-57, A159-60.) O'Connell did not appeal the dismissal of Counts II and IV.

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"employee" in Article 9 by adding language requiring current employment status.[5] (A140-41.) O'Connell timely appealed, seeking reversal of the dismissal of Counts I, III, and V.

On June 30, 2021, the Appellate Court reversed the Circuit Court's dismissal of Counts I, III, and V. (Op. ¶¶ 2, 37, A2, A16.) The Appellate Court rejected the interpretation of the Pension Code urged by Defendants, by which continuation of disability benefits depends upon continuation of County employment status:

> Applying the canons of liberal construction and the beneficial nature of pension laws, we find that the term "employed" [in Section 9-108 of the Pension Code] is broad enough to encompass persons such as O'Connell who began receiving disability benefits when they were actively working. Nothing in the operative language suggests that the disabled employee must continue to be employed to remain eligible for disability benefits or for the county to be required to continue making contributions.

(*Id.* ¶ 24, A11.) The Appellate Court alternatively held that even if the applicable Pension Code provisions were ambiguous, several separate rules of statutory interpretation supported the conclusion that continued employment status was not a condition to continued entitlement to disability benefits:

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[5] The Circuit Court stated that "Article 9 of the Pension Code is clear that an 'employee' who '*is* employed' by the County is entitled to receive disability benefits under the Pension Code. 40 ILCS 5/9-108; 40 ILCS 5/9-197." (A140 (emphasis added).) Neither section cited by the Circuit Court contains the "is employed" language. Nor does Section 9-157, the main provision at issue, which the Circuit Court likely intended to cite rather than Section 9-197 (which pertains to determining service credits).

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First, the Appellate Court stated that Article 9 contains provisions expressly terminating benefits based on certain events, but termination of employment is not one of them. Thus, applying the principle *expressio unius est exclusio alterius*, the Appellate Court concluded that Article 9 should not be read as permitting termination of benefits due to termination of employment.

Second, the Appellate Court applied the doctrine of *noscitur a sociis*, which looks to how the term "employee" is used in Article 9 to see if it is limited to persons who are current employees. The Appellate Court concluded that use of the term elsewhere in Article 9 included both current and former employees.

Third, the Appellate Court considered whether Defendants' interpretation "leads inexorably to an absurd result and would undermine the beneficial purpose of the pension laws"—and concluded that it would. (*Id.* ¶¶ 26-28, A12-13.)

Based both on the plain language of the statute and these rules of construction, the Appellate Court held that "under the Code, O'Connell was entitled to disability benefits and continued county contributions to the pension fund because he was employed at the time of his application for disability benefits[,]" and "his termination was not a triggering event causing the cessation of his disability benefits and county contributions to the pension fund." (*Id.* ¶ 29, A13.)[6]

[6] The Appellate Court did not reach the issue of whether the Pension Clause also required reversal of the Circuit Court judgment. (*Id.* ¶ 35, A16.)

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ARGUMENT

The Appellate Court was correct. O'Connell became disabled while employed by the County, initially applied for and received disability benefits while employed by the County, remained employed by the County for two years while fully disabled, and was terminated by the County solely because of his inability to return to work due to his permanent disability. There is no dispute that if the County had not terminated his employee status, O'Connell would have been entitled to receive approximately two additional years of disability benefits based on his years of service to the County (referred to as "Years of Service Credits," discussed below in Section I.B). There is also no dispute that O'Connell was a good employee for 19 years, and no dispute that he did not engage in any conduct warranting discharge. The question presented in this appeal is whether Article 9 of the Pension Code entitles O'Connell to continued disability benefits until his accrued disability benefits are exhausted, regardless of whether his status as a County employee continues.

I. Applicable Legal Authorities.

A. The Pension Clause

The Pension Clause of the Illinois Constitution guarantees that "[m]embership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Ill. Const. 1970, art. XIII, § 5. In other words, "if

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something qualifies as a benefit of the enforceable contractual relationship resulting from membership in one of the pension or retirement systems of any unit of local government . . . it cannot be diminished or impaired." *Carmichael v. Laborers' & Ret. Bd. Emps. Annuity & Ben. Fund of Chi.*, 2018 IL 122793, ¶ 25 (citation and internal quotation marks omitted). All pension benefits that flow directly from membership, including disability benefits, are protected, *id.*, and "members of pension plans subject to its provisions have a legally enforceable right to receive the benefits they have been promised," *In re Pension Reform Litig.*, 2015 IL 118585, ¶ 46; *accord Bd. of Trs. of Harvey Firefighters' Pension Fund v. City of Harvey*, 2017 IL App (1st) 153074, ¶ 176.

The contractual relationship protected by the Pension Clause "is governed by the actual terms of the contract or pension plan in effect at the time the employee becomes a member of the retirement system." *Matthews v. Chi. Transit Auth.*, 2016 IL 117638, ¶ 59. Here, the relevant contractual provisions are contained in Article 9 of the Illinois Pension Code, 40 ILCS 5/9-101 *et seq.*, which established the County Pension Fund and set out the annuities, disability benefits, and other pension benefits for County employees.

The Pension Clause also gives rise to an important principle of statutory construction not generally applicable: "[W]here there is any question as to legislative intent and the clarity of the language, 'it must be liberally construed in favor of the rights of the pensioner.'" *Carmichael*, 2018 IL 122793, ¶ 50 (quoting *Kanerva v. Weems*, 2014 IL 115811, ¶ 55).

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B. Article 9 of the Pension Code

Article 9 provides for two types of disability benefits: the "duty disability benefit" for employees disabled as a result of an injury incurred on the job, and the "ordinary disability benefit" for employees who become disabled from any other cause. Only the second form of benefit is relevant to this appeal.

For such ordinary disability benefits, Article 9 provides, in part, that

> [a]n employee . . . who becomes disabled after becoming a contributor to the fund as the result of any cause other than injury incurred in the performance of an act of duty is entitled to ordinary disability benefit during such disability, after the first 30 days thereof.

40 ILCS 5/9-157. The language granting the ordinary disability benefit states that the benefit continues "during such disability," *id.*—not "while continuing to be an employee."

The Pension Code guarantees at least three benefits to eligible disabled individuals like O'Connell. *First*, the Board issues payments to disabled individuals from the County Pension Fund in the amount of "50% of the employee's salary at the date of disability," *id.*; these payments are referred to in this brief as "**Disability Benefit Payments**."

Second, the Pension Code requires that the County contribute to the County Pension Fund on behalf of the disabled individual an amount equal to the amounts that the employee ordinarily contributes for annuity purposes, and half of one percent salary deductions required under another section of the

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Pension Code (40 ILCS 5/9-133).[7] *Id. Third*, the Pension Code provides that the County "shall contribute all amounts ordinarily contributed by it for annuity purposes for any employee receiving ordinary disability benefit as though he were in active discharge of his duties during such period of disability." 40 ILCS 5/9-181. The contributions by the County on behalf of the employee and the County required by Sections 9-157 and 9-181 are referred to in this brief as the "**County Contributions**."

When an individual has exhausted the credits for disability benefits (the "Years of Service Credits," discussed below) and continues to be disabled, the Pension Code provides at least two additional benefits. *First*, the individual has "the right to contribute to the fund at the current contribution rate for a period not to exceed a total of 12 months during his entire period of service and to receive credit for all annuity purposes for any such periods paid for." 40 ILCS 5/9-174. This benefit is referred to in this brief as the "**Credit Purchase Option**." *Second*, if the individual has exhausted his credits for disability benefits and is discharged or resigns before age 60 while still disabled, he "is

[7] Specifically, 40 ILCS 5/9-157 states:

> Instead of all amounts ordinarily contributed by an employee and by the county for age and service annuity and widow's annuity based on the salary at date of disability, the county shall contribute sums equal to such amounts for any period during which the employee receives ordinary disability and such is deemed for annuity and refund purposes as amounts contributed by him. The county shall also contribute ½ of 1% salary deductions required as a contribution from the employee under Section 9-133 [40 ILCS 5/9-133].

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entitled to receive the annuity provided from the total sum accumulated to his credit from employee contributions and county contributions to be computed as of his age on the date of withdrawal." 40 ILCS 5/9-160; *see also* 40 ILCS 5/9-116 (defining "withdrawal" to mean "[d]ischarge or resignation of an employee"). This disability benefit is referred to in this brief as the "**Early Annuity Option**."

Article 9 of the Pension Code specifies eight circumstances in which disability benefits are to be terminated. The first five are found in Section 9-157, which provides that disability benefits "shall cease" when the first of the following dates occurs:

> (a) the date disability ceases.
>
> (b) the date the disabled employee attains age 65 for disability commencing prior to January 1, 1979.
>
> (c) the date the disabled employee attains 65 for disability commencing prior to attainment of age 60 in the service and after January 1, 1979.
>
> (d) the date the disabled employee attains the age of 70 for disability commencing after attainment of age 60 in the service and after January 1, 1979.
>
> (e) the date the payments of the benefit shall exceed in the aggregate, throughout the employee's service, a period equal to ¼ of the total service rendered prior to the date of disability but in no event more than 5 years. In computing such total service any period during which the employee received ordinary disability benefit and any period of absence from duty other than paid vacation shall be excluded.

40 ILCS 5/9-157. Subsection (e) is referred to in this brief as the "**Years of Service Credits**."

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The other three statutory events that terminate disability benefits are contained in Section 9-159. That section states that disability benefits are "not payable" if the disabled employee (a) refuses to submit to an examination by a board-appointed physician; (b) receives any part of his salary or is employed by any public body supported in whole or in part by taxation; or (c) receives certain payments from the County under the Workers' Compensation Act or Workers' Occupational Diseases Act. 40 ILCS 5/9-159. A disabled employee must submit to periodic examinations, and "[w]hen the disability ceases, the board shall discontinue payment of the benefit." 40 ILCS 5/9-158.

None of the eight benefit-terminating circumstances in Article 9 applies to O'Connell. Only one even *potentially* could: termination based on Years of Service Credits. But termination on that basis will not occur until O'Connell had received all of his accrued disability benefits, an event that did not occur because of Defendants' actions. That is the remaining two years of benefits that the Board told O'Connell he would have received but for termination of his employment status.

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II. The County and the Board's Termination of O'Connell's Disability Benefits Violated the Pension Clause and the Pension Code.

The Appellate Court correctly applied well-established principles of statutory interpretation in concluding that Defendants' termination of O'Connell's disability benefits violated Article 9 of the Pension Code.

When construing a statute, the primary goal "is to ascertain and give effect to the legislature's intent," with the "best indicator of that intent [being] the language of the statute itself." *Carmichael*, 2018 IL 122793, ¶ 35. "But a court will not read language in isolation; it will consider it in the context of the entire statute. . . . It is also proper to consider not only the language of the statute but the reason for the law, the problem sought to be remedied, the goals to be achieved, and the consequences of construing the statute one way or another." *Id.* (citations omitted). Where the language is clear and unambiguous, the Court must apply the statute "without resort to further aids of statutory construction." *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 395 (2003) (citation omitted). If the statutory language is ambiguous, however, the Court may look to other sources to ascertain the legislature's intent. *Id.*

Because this case involves the Pension Code, an additional rule of construction applies: It is "well established" that "where there is any question as to the legislative intent and clarity of the language of a pension statute, it must be liberally construed in favor of the rights of the pensioner." *Carmichael*, 2018 IL 122793, ¶ 24. "Thus, to the extent that there may be any lingering

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doubt about the meaning or effect of the provisions at issue in this case, [the Court] must resolve that doubt in favor of the members of [the] public retirement system." *Id.*

A. The Plain Language of Article 9 Entitles O'Connell to Continued Benefits.

There is no dispute that Article 9 does *not* list termination of employment as grounds to end disability benefits. Nevertheless, Defendants contend that they were entitled to stop paying O'Connell's disability benefits. They argue that Section 9-157 impliedly contains an additional limitation—that disability benefits apply only to *current* employees. The Appellate Court correctly rejected this assertion as contrary both to the definition and use of the term "employee" in Article 9.

1. The Definition of "Employee" in Article 9 Makes Clear that "Employee" Includes Former Employees.

Section 9-157, the disability benefit provision, does not itself define "employee." Article 9's definition of "employee" is found in Section 9-108(a). In relevant part, it defines an "[e]mployee," "contributor," or "participant" as:

> Any employee of the county employed in any position in the classified civil service of the county, or in any position under the County Police Merit Board as a deputy sheriff in the County Police Department.
>
> * * *
>
> Any such employee in service on or after January 1, 1984, regardless of when he became an employee, shall be deemed a participant and contributor to the fund created by this Article and the employee shall be entitled to the benefits of this Article.

40 ILCS 5/9-108(a).

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The definition does not limit the meaning of "employee" to persons currently employed by the County at the time of entitlement to benefits. Rather, use of the past participle "employed" means that "employee" includes past, present, or future County employees, depending on the context.

In normal English, use of the past participle "employed" includes an individual who was "employed," as well as one who is currently "employed," and one who might be "employed" in the future. *See* Bas Aarts, Sylvia Chalker, & Edmund Weiner, *The Oxford Dictionary of English Grammar* 291 (2d ed. 2014) (past participles can be used to refer "to past, present, or future time"). The *only* relevant express reference to a time limitation in the definitional paragraph quoted above is that the employee must have been "in service on or after January 1, 1984." Had the General Assembly intended to limit the definition to current employees, as Defendants contend, it could easily have added to the last words of the definition the phrase "while the employee remains employed by the County." It did not do so.

Important guidance on legislative intent can be obtained from the fact that the "benefits" to which a County "employee" is expressly "entitled" under Article 9 include retirement annuities, widows' annuities, and children's annuities. Each is plainly a benefit that is available only to *former* employees or their family members. Individuals entitled to receive "retirement annuities" plainly no longer work for the County. They have retired. A widow only acquires the status of widow on the death of the employee to whom she is

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married. Yet Article 9 provides benefits for the former employee, the annuitant, his children, and his widow. These are express statutory rights for the benefit of individuals who are not current employees. If, as Defendants argue, "employed" in the definition of employee meant only currently employed, then none of these grants make any sense, because all are to the employee or the employee's family after the individual is no longer currently employed. Thus, the term "employed" in Section 9-108(a) must include former as well as current employees.

The Board urges the Court to interpret "employee" in Article 9 based on a different term ("Fireman") in a different Article of the Pension Code (Article 6), which governs a different pension fund. (Board Br. at 11-12.) A different term with a different definition in a different article of the Pension Code does not dictate the meaning of "employee" in Article 9. *See, e.g.*, *O'Keefe v. Ret. Bd. of Firemen's Annuity & Ben. Fund of Chi.*, 267 Ill. App. 3d 960, 963 (1st Dist. 1994) ("Because of the differences between articles 4 and 6," decision under article 6 does not apply to case under article 4.). The Board cites *Gutraj v. Board of Trustees of Police Pension Fund of Village of Grayslake*, 2013 IL App (2d) 121163, ¶ 8, for the proposition that "when the legislature uses certain language in one part of a statute and different language in another part," courts assume "different meanings were intended." (Board Br. at 12.) But the court in *Gutraj* interpreted two provisions of the *same* article of the Pension

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Code (Article 3), and nothing in that case supports the Board's invitation to interpret a term in one article based on a different term in a different article.[8]

In any event, the definition of "Fireman" in Article 6 ("any person who (a) was, is or shall be employed by a City . . .") does not support Defendants' argument. The Board fails to explain why use of the single term ("employed") that includes all three time periods covered by "was, is or shall be" does not control, since that is the term used in Article 9. At most, the use of three words where one would suffice shows that the drafter of Article 6 wished to leave no doubt. That does not change the fact that the drafters of Article 9 are permitted to use one word that covers three time periods despite the fact that a different drafter of a different statute chose to use three words.[9]

Amicus Curiae Forest Preserve makes an argument similar to that of the Board. It argues that the lack of definitions of "'former employee' or 'past employee' or 'terminated employee'" means that the legislature did not intend

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[8] The case cited by *Amicus Curiae* Forest Preserve for the same point, *People v. Chairez*, 2018 IL 121417, ¶ 18, similarly involved the interpretation of various provisions in the *same* statute. (*See* Forest Preserve Br. at 4.)

[9] Sometimes drafters use more than one word to describe what is adequately described in one word elsewhere. But that does not mean that the more concise formulation is inconsistent with the longer version. *See Cont'l Cas. Co. v. Midstates Reinsurance Corp*. 2014 IL App (1st) 133090, ¶ 18 (belt-and-suspenders drafting indicated "an abundance of caution rather that an intention to exclude [a specific term] in reinsurance agreement"). *See also* E. Leib and J. Brudney, "The Belt-and Suspenders Canon" 105 Iowa L. Rev. (2020), available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1993&context=faculty_scholarship.

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that Article 9 grant ordinary disability benefits to former employees. (Forest Preserve Br. at 4-5.) But such definitions are unnecessary in light of the normal meaning of the word "employed" as including all such past, former, or terminated employees. Article 9 does not separately define categories of former employees because the term "employed" already includes them.[10]

Even if the absence of the phrase "was, is, or shall be" (as used in Article 6) could be said to render the definition of "employee" in Article 9 ambiguous, Article 9 construed as a whole confirms that "employee" who is entitled to benefits in Section 9-157 includes former employees, such as O'Connell, who are terminated while receiving disability benefits and before they have exhausted their Years of Service credits.

2. The Disability Benefits Provisions of Article 9 Do Not Limit Benefits to "Current" Employees.

Section 9-157 does not separately define or limit Section 9-108(a)'s definition of "employee," which, as discussed above, includes former employees. The Appellate Court properly concluded that "[n]othing in the operative language suggests that the disabled employee must continue to be employed to

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[10] The Forest Preserve's reference to Article 9's definitions of "present employee" and "future entrant" (Br. at 4-5) is irrelevant to termination of benefits. These definitions are used only to define classes of employees based on their date of employment and when they began contributing to the Fund in relation to certain amendments to Article 9. *See* 40 ILCS 5/9-109; 40 ILCS 5/9-110. That use of the term "present" or "future" was based on specific amendments and the resulting need to define separate dates of eligibility of subsets of employees.

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remain eligible for disability benefits or for the county to be required to continue making contributions." (Op. ¶ 24, A11.) Contrary to the County Brief at 12-13, the Appellate Court did not "assum[e] that employees receiving disability benefits [under Section 9-157] are no longer County employees" who must have resigned or retired in order to receive those benefits. Rather, the Appellate Court correctly noted that Section 9-157 uses the term "employee" to include individuals who are "no longer working" and have been receiving ordinary disability payments "for some time[,]"citing, *inter alia*, Section 9-157(e), which provides for up to five years of Years of Service Credits. (Op. ¶ 18, A7-8.)

B. The Statutory Framework and Purpose of the Statute Show that "Employee" in Section 9-157 Includes Former Employees.

Even if the terms "employee" in Section 9-157 and "employed" in Section 9-108(a) are ambiguous,[11] the Appellate Court correctly concluded that "the rules of statutory interpretation lead us to the same result[,]" that termination of O'Connell's employment was not grounds to end his disability benefits. (Op.

[11] A statute is ambiguous "if it is capable of being understood by reasonably well-informed persons in two or more different ways." *Krohe*, 204 Ill. 2d at 395-96. The use of the past participle often creates ambiguity in statutes. *See, e.g.*, *Ready v. United/Goedecke Servs., Inc.*, 232 Ill. 2d 369, 378 (2008) (holding that phrase "defendants sued by the plaintiff" was ambiguous); *id.* at 392-94 (Garman, J., dissenting) (use of past participle indicated that phrase meant all defendants against whom plaintiff filed suit and not just those remaining in the lawsuit at time of trial); *Bernal v. NRA Grp., LLC*, 930 F.3d 891, 895-96 (7th Cir. 2019) ("A quick survey of judicial opinions confirms that the past participle is an uncommonly flexible device.").

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¶ 25, A11.) Even if Section 9-157 were ambiguous, "the rule applies that, where there is any question as to legislative intent and the clarity of the language, 'it must be liberally construed in favor of the rights of the pensioner.'" *Carmichael*, 2018 IL 122793, ¶ 50 (quoting *Kanerva*, 2014 IL 115811, ¶ 55).

1. Article 9 Does Not Include Termination of Employment as an Event Causing Termination of Disability Benefits.

Aside from their argument that "employed" in the definition of "employee" in Article 9 means only current employee (which, as discussed, contradicts the normal usage of terms that can cover past, present, and future time periods), Defendants have no other statutory basis for ending O'Connell's disability benefits based on the County terminating his employee status. Article 9 clearly states that a disabled employee is "entitled to ordinary disability benefit *during such disability*" until the occurrence of one of five enumerated events (or "dates") that cause the disability benefits to "cease," 40 ILCS 5/9-157 (emphasis added), *or* until one of three listed events that make the disability benefits "not payable," 40 ILCS 5/9-159. There is no dispute that none of these eight possible benefits-terminating events applies to O'Connell.

The Appellate Court correctly concluded that these eight listed events are the *only* events that trigger termination of disability benefits under Article 9. As the Appellate Court explained:

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> When determining whether a listing in a statute is exclusive, courts use the rule of statutory construction known as e*xpressio unius est exclusio alterius*. The rule "is based on logic and common sense. It expresses the learning of common experience that when people say one thing they do not mean something else. The maxim is closely related to the plain language rule in that it emphasizes the statutory language as it is written." *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 152 (1997) (citing 2A Norman J. Singer, Statutes and Statutory Construction §§ 47.24, 47.25, at 228, 234 (5th ed.1992)). Simply put, "[w]here a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions, despite the lack of any negative words of limitation." *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 442 (1992) (citing *Department of Corrections v. Illinois Civil Service Comm'n*, 187 Ill. App. 3d 304, 310 (1989)).

(Op. ¶ 26, A12.) "Applying this rule supports O'Connell's position." (*Id.*) As the Appellate Court concluded, "[s]ince O'Connell's termination is not one of the eight listed triggering events under the Code, we may presume that the legislature did not intend to include termination as a triggering event under some other guise." (*Id.*) That presumption is correct.

Defendants' arguments for expanding the limited set of benefits-terminating events carefully delineated in Article 9 are really a request to rewrite the statute. That request can only be addressed to the Legislature, not to the Court. In making this request, Defendants ask the Court to violate the principle of statutory construction that the language of a pension statute "must be liberally construed in favor of the rights of the pensioner." *Carmichael*, 2018 IL 122793, ¶ 24; *see also Shields v. Judges' Ret. Sys. of Ill.*, 204 Ill. 2d 488, 496-97 (2003) (declining to find basis for limiting refund of pension contributions based on pensioner's felony conviction where statute was "silent on the subject"

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and refusing to "impose any conditions that are not clearly required by the statutory language").

2. Article 9 Uses "Employee" to Refer to Both Current and Former Employees.

The Appellate Court's interpretation of "employee" in Section 9-157 to include former employees "is also supported by the doctrine of *noscitur a sociis* ('a word is known by its companions')." (Op. ¶ 13, A13.) Article 9 contains many instances where the term "employee" is used to refer to *former* employees and their families, rebutting Defendants' argument to the contrary. For example, regarding disability benefits specifically:

- Section 9-159 refers to the disability benefit payable to the widow of "an **employee**," who, being deceased, clearly is not a current employee. 40 ILCS 5/9-159 (emphasis added).

- Section 9-160 states that for "[a]n **employee** whose disability continues after he has received ordinary disability benefit for the maximum period of time prescribed by this Article, and who *withdraws* before age 60 while still so disabled," the employee's children are entitled to certain annuity benefits "[u]pon [his] death." 40 ILCS 5/9-160 (emphasis added). ("[W]ithdraws from service" means "[d]ischarge or resignation of an employee." 40 ILCS 5/9-116.)

Regarding other benefits:

- Section 9-135.1 discusses the death benefit payable "[u]pon the death of an **employee** in service *or* while receiving a retirement annuity." 40 ILCS 5/9-135.1 (emphasis added). As the Appellate Court acknowledged (Op. ¶ 28, A13), the only employees that can receive a retirement annuity are, by definition, former employees.

- Section 9-148 states that in certain circumstances "widows or wives of employees have no right to annuity," such as "(c) The widow or wife of an **employee** with 10 or more years of service whose death occurs out of and *after he has withdrawn from service*, and who has received a refund of contributions for annuity purposes; [and] (d) The widow

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> or wife of an **employee** with less than 10 years of service who dies out of service *after he has withdrawn from service* before he attained age 60." 40 ILCS 5/9-148 (emphasis added).

- Section 9-154 provides, in part, that a "Child's Annuity" is payable "[u]pon death of an **employee** *who withdraws from service* after age 50 . . . and who has entered upon or is eligible for annuity." 40 ILCS 5/9-154(c) (emphasis added).
- Section 9-161 discusses the calculation of annuities "[w]hen an **employee** *who has withdrawn from service* after the effective date re-enters service." 40 ILCS 5/9-161 (emphasis added).

In each of these provisions, the term "employee" is used to refer to an "employee" who is *not* a current employee. The term is used similarly in Section 9-157 addressing ordinary disability benefits.

To illustrate, take the example noted above from Section 9-135.1, and substitute the Defendants' meaning ("a current employee") for the statutory language ("an employee"). The result is nonsense: "[u]pon the death of a current employee . . . while receiving a retirement annuity." A current employee cannot be receiving a retirement annuity. The same is true of the other uses in Article 9 of the word "employee" if it meant only "current employee."

3. Defendants' Interpretation Conflicts with Article 9's Purpose and Leads to Absurd and Unjust Results.

The Appellate Court correctly rejected Defendants' interpretation of Article 9 as leading to absurd results. (Op. ¶ 27, A12-13.) It is "axiomatic that courts must construe statutes to avoid absurd results." (*Id.* (citing *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 70).) Therefore, when interpreting

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a statute, it is proper to consider "the reason for the law, the problem sought to be remedied, the goals to be achieved, and the consequences of construing the statute one way or another." *Carmichael*, 2018 IL 122793, ¶ 35.

As the Appellate Court recognized, "[t]he purpose of the Illinois pension laws is beneficial." (Op. ¶ 27, A12 (citing *Kozak v. Retirement Bd. of Firemen's Annuity & Benefit Fund*, 95 Ill. 2d 211, 217 (1983) ("Our court has recognized that '[t]he purpose of pension laws is beneficial' and has held that 'statutes of that character should be liberally construed in favor of those intended to be benefited.'")).) Defendants ignore this beneficial purpose.

Requiring continued current employee status to be eligible for accrued disability benefits would render superfluous (or subject to unfettered County control) other beneficial provisions in Article 9 related to disability benefits. Sections 9-160 and 9-174 provide benefits to disabled employees who have exhausted their disability credits, *i.e.*, employees who have received disability benefits for the maximum amount of time allowed by their Years of Service Credits. The additional benefits are the Early Annuity Option and the Credit Purchase Option, respectively. Importantly, the Legislature provided that these disability benefits only kick in when employees exhaust their disability benefits and are still disabled. *See* 40 ILCS 5/9-160 ("An employee whose disability continues after he has received ordinary disability benefit for the maximum period of time prescribed by this Article . . ."); 40 ILCS 5/9-174 ("In

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the case of any disabled employee whose credit for ordinary disability benefit purposes has expired and who continues to be disabled . . .").

There is clearly tension between these provisions and Defendants' argument that current employee status is required to be entitled to benefits under Article 9: Defendants say that the County can fire an individual and thereby terminate his or her accrued disability benefits. But what about the benefits that the Legislature provided can begin only after the disabled individual's ordinary disability benefits have been exhausted: the Early Annuity Option and the Credit Purchase Option? It doesn't make sense that the Legislature would have granted these additional benefits to disabled individuals after their disability benefits have been exhausted, yet allowed the County to terminate the additional benefits by simply declining to maintain the individual's status as a County employee.

That cannot be what the Legislature intended, for it would render the Early Annuity Option and the Credit Purchase Option entirely dependent upon unfettered County discretion, with no standards in the statute to guide exercise of the discretion. *See Kozak*, 95 Ill. 2d at 217; *see also Int'l Ass'n. of Fire Fighters Local 50 v. City of Peoria*, 2022 IL 127040, ¶ 12 ("No part of a statute should be rendered meaningless or superfluous.") (quoting *Rushton v. Dep't of Corr.*, 2019 IL 124552, ¶ 14). The most reasonable meaning of these two additional benefits is that the Legislature intended that disabled

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individuals continue to receive disability benefits until they have exhausted their Years of Service Credits and *then* be eligible for an annuity.

Accepting Defendants' interpretation also would have the perverse effect of incentivizing the County to terminate any disabled employee who becomes permanently disabled while working. The County's unfettered discretion would apply regardless of how long or how well the employee had served the County and contributed to the County Pension Fund. It is not reasonable to believe the Legislature wished to permit such action.[12]

Defendants do not dispute the effects of their position, as described above. Instead, they attempt to find an "absurdity" in the Appellate Court's reasoning. They point to Section 9-157, which states:

> [a]n employee who has withdrawn from service or was laid off for any reason, who is absent from service thereafter for 60 days or more who re-enters the service subsequent to such absence is not entitled to ordinary disability benefit unless he renders at least 6 months of service subsequent to the date of such last re-entry.

40 ILCS 5/9-157.

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[12] The purported "procedural protections" and "safeguards" related to improper terminations raised by the County (at 14) and *Amicus Curiae* Forest Preserve (at 6) would not prevent this result. Here, there is no dispute that O'Connell was terminated because he is permanently disabled and unable to provide a return-to-work date. His challenge is to the termination of his disability benefits, not the termination from employment. Unlike other articles in the Pension Code, nothing in Article 9 prevented the County from terminating O'Connell based on his permanent disability. *Cf.* 40 ILCS 5/4-112 ("No physical or mental disability that constitutes, in whole or in part, the basis of an application for benefits under this Article may be used, in whole or in part, by any municipality or fire protection district employing firefighters, emergency medical technicians, or paramedics as cause for discharge.").

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Defendants argue that if disability benefits are payable to O'Connell, then he and other disabled employees who had been permanently discharged "would receive more favorable treatment" than "a disabled employee who is merely *temporarily* laid off due to budgetary concerns and then returns to service." (County Br. at 9-10; *see* Board Br. at 15-16.)

Defendants' reasoning is wrong. Someone "who re-enters the service" is not, by definition, any longer a *disabled* individual. Thus, Section 9-157 requires a *non-disabled* employee returning to service after an absence to serve for six months before again becoming eligible for ordinary disability benefits. That is logical and consistent with reading Article 9 to provide for a *disabled* employee to continue to receive accrued disability benefits when he is discharged while disabled. If the County "re-employed O'Connell" (Board Br. at 15), and he were to re-enter the service, that would mean he was no longer disabled. He would not be receiving disability benefits, and the six-month requirement would apply to him before he would be eligible for such benefits again, just as it would to a temporarily discharged employee who seeks to return to service. The inconsistency that Defendants argue does not exist.

Continuing their quest to find absurd results from the Appellate Court's ruling, Defendants also argue that paying disability benefits to O'Connell "would mean that a disabled employee who is *permanently* discharged from service—even for gross misconduct—would receive more favorable treatment under Article 9 than a disabled employee who is merely *temporarily* laid off

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due to budgetary concerns and then returns to service." (County Br. at 9-10.) This argument is a red herring and is incorrect because the Legislature has specifically provided rules for termination or limitation of pension rights for certain misconduct. Those provisions are equally applicable to those permanently discharged and those temporarily laid off and rehired. There is no "more favorable treatment" issue. *See* 40 ILCS 5/9-235 (authorizing termination of benefits "to any person who is convicted of any felony relating to or arising out of or in connection with the service of the employee from whom the benefit results."); 40 ILCS 5/9-120.1e (denying right to purchase credit for military service to one "dishonorably discharged"). *Cf. People ex rel. Madigan v. Burge,* 2014 IL 115635 (Chicago Police Pension Board has authority to terminate pension of individual found to have committed felony in course of performing public employee duties). These express rights of the Board to terminate or deny pension benefits clearly state the Legislature's judgment about the circumstances that warrant such action, and the rules apply equally to permanently and temporarily disabled individuals. Again, the inconsistency that Defendants posit does not exist.

The other provisions in Article 9 that Defendants discuss in attacking the Appellate Court's reasoning don't help them. All are consistent with continuation of disability benefits for someone like O'Connell, who was already receiving disability benefits when his employment was terminated. Thus, the definition of "disability" in Section 9-113 (*see* Board Br. at 12) reflects the

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requirement that an employee be in service to the County at the time he or she becomes disabled to become *initially* eligible for disability benefits. Sections 9-158 and 9-159 (*see* Board Br. at 9-10) establish the common-sense requirement that an employee who is no longer disabled (or willing to submit to an examination to show continued disability) is no longer eligible for disability benefits.

These provisions are not inconsistent with the *continuation* of benefits for an employee who was permanently disabled before he was terminated, and who remains disabled, such as O'Connell. *See Greenan v. Bd. of Trs. of Police Pension Fund of Springfield*, 213 Ill. App. 3d 179, 186-87 (4th Dist. 1991) (holding that plaintiff's resignation did not sever his rights to a disability pension under Article 3 and that the obligation to submit to periodic examination "do[es] not arise from plaintiff's employment status with the police department but rather from the Board's jurisdiction over one receiving disability pension benefits").

The Board incorrectly suggests that O'Connell is not entitled to disability benefits because the retirement annuity provided under Article 9 replaces his disability benefits when his employment ends. (*See* Board Br. at 7-8.) The Board cites Section 9-157, which states that "[t]he disability benefit prescribed herein shall cease when the first of the following dates shall occur and *the employee, if still disabled, shall thereafter be entitled to such annuity as is otherwise provided in this Article* . . . ." (*Id.* (quoting 40 ILCS 5/9-157

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(emphasis added by the Board).) But this does not say that the annuity benefit replaces the disability benefit on termination of employment. The two are separate. Indeed, *every* former employee "could apply for a retirement annuity for which they otherwise qualified under Article 9," (*see* Board Br. at 8), regardless of whether they had previously received a disability benefit.[13] To the extent there is a nexus between the two, it is through the Early Annuity Option, but that benefit is only available to disabled employees who have "received ordinary disability benefit for the maximum period of time prescribed by [Article 9], and who withdraw[] before age 60 while still so disabled[.]" 40 ILCS 5/9-160. As discussed above, this benefit is rendered illusory if the County can discharge a disabled employee and thereby end his disability benefits before he has received them "for the maximum period of time" allowed by Article 9.

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[13] Depending on the circumstances, an employee may be entitled to receive no retirement annuity or a retirement annuity with benefits that are lower than if the disability benefits were to continue for a longer period of time before commencing the retirement annuity. The retirement annuity benefit increases (i) the longer contributions are made to the Pension Fund on behalf of the employee, which occurs while an employee is on disability through the County Contributions, and (ii) the longer an employee waits to receive the retirement annuity. *See Tier 1 Benefits,* COOK COUNTY PENSION FUND, https://www.cookcountypension.com/employees/tier-1-explanation-benefits/ (last visited February 17, 2022). Because the Board and the County stopped paying O'Connell's disability benefits before he had exhausted his Years of Service Credits, O'Connell was denied the Credit Purchase Option, the Early Annuity Option, and approximately two years of contributions to the Fund that would have increased his retirement annuity.

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None of Defendants' arguments demonstrate any absurdity or unreasonableness in the Appellate Court's reasoning. Nor do Defendants identify any provisions of Article 9 that are inconsistent with the conclusion that a permanently disabled individual who began receiving disability benefits while working for the County is entitled to continue to receive those benefits after the County terminates his employment, until he has exhausted his Years of Service Credits.

C. The Appellate Court's Decision is Consistent with *Di Falco* and *DiFiore*.

Contrary to Defendants' arguments (County Br. at 11-14; Board Br. at 12-13), the Appellate Court's decision is consistent with both *Di Falco v. Board of Trustees of 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).

Di Falco does not hold that "discharged public employees are not entitled to collect disability benefits," as the Board contends (at 9). Nor does it control this case, as the County argues (at 11). In *Di Falco*, the Court ruled that a former probationary firefighter who had been properly discharged for reasons unrelated to his disability was not entitled to *apply* for a duty-related disability pension under Article 4 of the Pension Code *after* his discharge. 122 Ill. 2d at 24-25. The question was whether a probationary employee who had been properly discharged and had not applied for a duty-disability benefit while

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employed could wait until long after his discharge to then claim that he had been injured while working and should get a duty-disability pension.

Those facts are nothing like this case. O'Connell applied for and was granted ordinary disability benefits while *still employed* by the County and was terminated due to his disability. Cases under other articles of the Pension Code recognize that a current employee who applies for a disability benefit when he is disabled is entitled to receive it after he ceases to be employed. There is no general rule to the contrary, as Defendants posit from *Di Falco. See, e. g.*, *Iwanski v. Streamwood Police Pension Bd.* , 232 Ill. App. 3d 180, 188-91 (1st Dist. 1992) (rejecting pension board's argument that "in order to be eligible for a disability pension, the applicant must be a police officer at the time of the application as well as the receipt of benefits" and holding that "[plaintiff's] discharge does not bar his entitlement to a disability pension" under Article 3); *Greenan*, 213 Ill. App. at 186 ("plaintiff's resignation did not sever his rights to the disability pension: plaintiff was a police officer at the time of injury and at the time he applied for a disability pension" under Article 3).

Di Falco does not apply to this case for another reason: It interpreted Article 4 of the Pension Code, not Article 9. Later cases recognize the limited nature of *Di Falco* and hold that discharged public employees (who are a subset of former employees) *are* entitled to disability benefits under other articles of the Pension Code. *See, e. g.*, *Iwanski*, 232 Ill. App. 3d at 188-91; *Greenan*, 213

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Ill. App. 3d at 186; *O'Keefe*, 267 Ill. App. 3d at 963. These courts interpreting different articles of the Pension Code have correctly distinguished *Di Falco* on the ground that the Court's analysis in that case was tied to the specific statutory language of the article that it interpreted and the facts of the case—a discharged firefighter who *applied* for duty-disability benefits *after* his discharge.

The County (at 10-11) points to the Court's statement in *Di Falco* that "a discharged fire fighter is obviously not 'employed,' in any sense of the word, by a city in its fire service and the pension fund was not established for his benefit." 122 Ill. 2d at 28. But the County ignores the context of that statement, which is found in the sentence that immediately preceded it: "the *benefit of a duty-related pension is intended to go to a particular class* and the purpose of the establishment of that benefit is much more selective than that of the Workers' Compensation Act . . . " *Id.* (emphasis added). In that context, the Court concluded that a fireman who had not sought a disability pension while employed was not "employed" as the term was used in disability-benefit provision of that statute, Section 4-110.

The Court explained: "the primary purpose of the establishment of a duty-related disability pension under section 4-110 is to provide for the benefit of fire fighters who would still be employed as fire fighters and receiving a salary if not for the disability." *Id.* at 30. Therefore, the Court concluded that "the term 'fireman' as used in section 4-110 [providing the duty-disability

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pension] is operative both at the time of impairment and application. To receive a disability pension under section 4-110, a fire fighter must not have been discharged prior to application therefor." *Id.* That answered the question presented in *Di Falco*, which was whether a discharged probationary fireman who waited almost a year after his discharge could apply for a disability pension.

The ambiguity the Court in *Di Falco* was concerned about was *not* the term "employed" standing alone, which was used in that case to define fireman. It was with the provision for duty-disability pensions in Article 4-110 that the Court said was ambiguous when "read in conjunction with" the definition. *Id.* at 27. Thus, *Di Falco* does not hold that use of the word "employed" in defining an individual who is an "employee" is automatically limited to a current employee.

While *Di Falco*'s result is not controlling in this case, the Court's method of analysis is. The Court there properly looked to other provisions of Article 4 to determine whether the Legislature intended to allow a discharged, probationary fireman to seek a duty-related disability benefit *after* he was discharged. The Court concluded that the Legislature did not because of other provisions of the same Article. For example, one provision required annual physical exams of the disabled fireman and provided that the fireman *shall* be reinstated upon proof that the disability had ended. The Court noted that the provision could not apply to a fireman like the plaintiff who had been

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discharged since he would not have a right to immediate reinstatement. Another provision stated that under certain circumstances the disabled fireman may elect to retire. The Court stated that provision could not apply to a fireman who had previously been discharged since he would not have been eligible to retire if he were no longer part of the service. *Id.* at 28-29. Thus, these other provisions confirmed that an individual who had been discharged and only thereafter applied for a duty disability was not included in the persons eligible for that benefit.

The Appellate Court applied the same method of analysis in this case to Article 9 and correctly concluded that Article 9 read as a whole supports O'Connell's position. As explained above, the plain language, statutory framework, and purpose of Article 9 establish that termination of employment does not, on its own, extinguish an employee's entitlement to disability benefits. Rather, the other provisions support the continuation of benefits, until the disabled individual has exhausted his or her Years of Service Credits. Notably, in contrast to Article 4 discussed in *Di Falco*, Article 9 in this case does not mandate reinstatement of an employee to active service upon recovery from his disability. *Compare* 40 ILCS 5/9-158 ("When the disability ceases, the board shall discontinue payment of the benefit."), *with Di Falco*, 122 Ill. 2d at 28 (citing 5/4-112) ("Upon satisfactory proof . . . that a fireman on the disability pension roll has recovered from his disability, the Board shall order that his pension cease. The fireman *shall* report to the marshal . . . who *shall* thereupon

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order his reinstatement into active service . . ."). This is consistent with a *former* employee receiving disability benefits. *See Iwanski*, 232 Ill. App. 3d at 190-91 (absence in Article 3 of mandatory-reinstatement provision following recovery from disability supported provision of disability pension to former police officer who applied for benefits while employed and was later discharged); *Greenan*, 213 Ill. App. at 185 (same).

The Appellate Court's analysis is also consistent with the First District's decision in *DiFiore*. That court applied Article 5 of the Pension Code to a police officer who was denied pension benefits by the Retirement Board after being convicted of a felony. 313 Ill. App. 3d at 548-52. The police officer had been receiving ordinary disability benefits when he was indicted for an off-duty sexual assault that occurred years earlier. As a result of the indictment, the Retirement Board suspended the officer, who elected to retire a few months later, before the criminal charge against him had been resolved. The Retirement Board had suspended the officer's disability benefits while it determined the effect of his suspension on the continuation of disability benefits. *Id.* After retiring, the officer pleaded guilty to the sexual-assault charge and, having reached the required age, then applied for pension benefits. The Retirement Board denied his request for pension benefits, relying on a provision of Article 5 stating that "[n]one of the benefits provided for in this Article shall be paid to any person who is convicted of any felony while in receipt of disability benefits." *Id.* The Retirement Board maintained that this

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provision applied because the officer had "had a legal right to ongoing ordinary disability benefits after his retirement" even though the disability benefits had been suspended at the time of his conviction. *Id.*

The Appellate Court in *DiFiore* reversed, reasoning that the officer had not been "convicted of any felony while in receipt of disability benefits," as required to deny pension benefits. When convicted, he was not receiving any benefits, as the Retirement Board had suspended them after his suspension. *Id.* at 551. Nor was he eligible for them. *Id.* Contrary to the Board's Brief at 14, the court did not establish a requirement that the governing article of the Pension Code have an "express declaration for the continuation of benefits" in order for an individual to be eligible to continue to receive benefits. Rather, the court rejected as inapplicable cases relied on by the Retirement Board because they involved Article 3 of the Pension Code, while the officer's rights arose under Article 5. *Id.* The court noted that, unlike in Article 3, "[t]here is no provision in [A]rticle 5 that allows plaintiff to receive ordinary disability benefits after he retires." *Id.* at 550. Thus, the court found the officer was entitled to retirement benefits because he had not been eligible for disability benefits when he was convicted. Nothing in the complicated facts or differing pension law provisions in *DiFiore* bears any resemblance to this case.

D. The Appellate Court's Holding Is Narrow.

The Board's argument that the Appellate Court's ruling will have "a significant detrimental economic effect on the administration of all pension

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funds throughout the State" is wrong. (Board Br. at 1, 16-17.) Any alleged economic effects, even were they real, are for the Legislature to address, and it has done so for ordinary disability benefits in Article 9 by imposing the limitation of Years of Service Credits.

In Section 9-157(e) the Legislature addressed the economic effect of permanent disabilities by providing no more than five years of Years of Service Credits, as the Appellate Court noted. (Op. ¶ 18, A7-8.) Defendants acknowledge that a disabled employee's entitlement to ordinary disability benefits is limited to a period of time equal to one-quarter of the total service rendered before the date of disability, *up to but not to exceed five years*. (County Br. at 3; Board Br. at 17); *see* 40 ILCS 5/9-157(e). In O'Connell's case he was entitled to approximately two years of additional benefits before he hit the statutory cap.

Thus, contrary to the hyperbole in the Board's Brief at 16, the Appellate Court's decision does not provide O'Connell with an "enduring right to ordinary disability benefits" or impose an open-ended obligation on the Board or the County for the County Contributions. Several months before terminating all benefits in July 2019, the Board had informed O'Connell that he would be entitled to ordinary disability benefits that amounted to another two years, through approximately August 2021, based on his years of service. (Compl. ¶ 7, A146.) In this lawsuit, O'Connell is seeking the approximately two years of disability benefits he had been promised and to which he is entitled based on

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his years of service to the County. There is nothing open-ended or unreasonable about that.

The Board does not argue (nor could it) that allowing O'Connell's two years of disability benefits would have a significant economic impact on the Pension Fund.[14] Rather, the Board points to the absence of a limitation on *duty* disability benefits in Article 9 and claims that application of the Appellate Court's ruling "to participants in receipt of duty disability benefits would have significant financial consequences to the Fund." (Board Br. at 17.)

But this case does not involve duty disability benefits. Continuation of *duty* disability benefits after termination was not an issue before the Appellate Court nor is it before this Court. O'Connell was receiving ordinary disability benefits at the time he was terminated, not duty disability benefits. His claim for the continuation of ordinary disability benefits rests upon the provisions in Article 9 related to ordinary disability benefits. The provisions in Article 9 related to duty disability benefits may or may not lead to the same result, but that is not at issue in this case.[15]

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[14] *Amicus Curiae* Forest Preserve contends the Appellate Court's ruling could have a "significant financial impact" on the Forest Preserve, but the statistics it cites do no support that claim. (Forest Preserve Br. at 2.) While, according to the Forest Preserve, forty Forest Preserve employees have taken ordinary disability leave over the past five and a half years, the Forest Preserve points to none that were discharged or resigned from service due to their permanent disability while they were receiving disability benefits.

[15] For example, Section 9-156, the provision related to duty disability benefits, states that an employee is entitled "receive duty disability benefit,

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The Board's concern about the application of this case to other articles of the Pension Code is similarly unwarranted. (Board Br. at 17-18.) As the cases discussed above make clear, each article of the Pension Code must be interpreted based on its specific statutory language and in the context of the article as a whole. The Board has not identified any other articles with the same statutory language as is at issue here.

The Board's *in terrorem* arguments also should be rejected as another variant of the assertion frequently made in pension litigation that what the plaintiff seeks costs too much. This Court has repeatedly rejected attempts by the State and by local governments to deny or diminish the benefits promised under state law based on purported economic reasons. *See, e. g.*, *In re Pension Reform Litigation*, 2015 IL 118585, ¶¶ 53-60 (citing cases and noting that governmental attempts to "reduce or eliminate expenditures protected by the Illinois Constitution" due to "fiscal difficulties" have been "clearly and consistently found . . . to be improper"); *see also* Ill. Const. 1970, art. XIII, § 5 (upholding pension benefits in the Illinois Constitution).

Finally, the Board contends that the Appellate Court's decision is essentially "asking the Board to ignore its fiduciary duties[.]" (Board Br. at 18.)

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during any period of such disability *for which he receives no salary*." 40 ILCS 5/9-156 (emphasis added). The provision related to ordinary disability benefits, Section 9-157, does not contain the italicized language. Moreover, duty disability benefits will terminate for an employee who is eligible to return to service and does so, a factor not applicable to a permanently disabled individual like O'Connell.

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The Board's argument rests on the incorrect assumption that Article 9 does not require the payments O'Connell seeks, as if it would be giving away funds he is not entitled to if it paid him the remaining months of benefits. The argument is nonsense. The Appellate Court held O'Connell to be entitled to those benefits. The Board would not be violating its fiduciary duties when it pays O'Connell what the courts have decided that he is entitled to receive.[16]

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16 Unlike in *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497 (2006), (*see* Board Br. at 18), in which an applicant who was not entitled to benefits sought them, the Board's actions here have "unfairly diverted" funds from O'Connell, a deserving applicant who is entitled to the benefits he requests.

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CONCLUSION

The Court should affirm the Appellate Court's ruling. The facts are uncontested. Receipt of pension benefits are vital to disabled persons like O'Connell. He is entitled to them as a matter of law.

The Court should order the Board and the County to pay O'Connell's remaining disability benefits and afford him the right to exercise the Credit Purchase Option and Early Annuity Option after he has exhausted his Years of Service Credits. The Court should grant such further relief as it deems just and proper.

February 18, 2022

Respectfully submitted,

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By: */s/ Mary Eileen C. Wells*
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, 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 45 pages.

By: *<u>/s/ Mary Eileen C. Wells</u>*
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on February 18, 2022, she caused a copy of the foregoing **Appellee's Brief** to be filed electronically with the Clerk of the Illinois Supreme Court and to be served upon the following counsel via Odyssey eFileIL and email:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in the foregoing Certificate of Service are true and correct, except as to matters therein stated to be upon information and belief and as to such matters the undersigned certifies that she verily believes the same to be true.

Dated: February 18, 2022

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