STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0295

PAUL W. BROWN

VERSUS

BOARD OF TRUSTEES – MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM

Judgment Rendered: DEC 1 8 2017

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C643743

The Honorable Wilson Fields, Judge Presiding

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Paul W. Brown

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Board of Trustees of the Municipal Police Employees' Retirement System

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

Welch J. concurs without reasons.

THERIOT, J.

The appellant, Paul W. Brown, appeals the judgment of the Nineteenth Judicial District Court that denied a permanent injunction against the appellee, the Board of Trustees of the Municipal Police Employees' Retirement System (MPERS). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

The appellant is a retiree of the Monroe Police Department (MPD). On December 28, 1991, the appellant, while in the performance of his official duties as a police officer for the MPD, was shot in the area of his left foot and ankle. After recovering from his injuries, the appellant returned to work with the MPD in 1992, but continued to have worsening difficulties with pain in his left foot and leg. On January 9, 2007, the appellant required reconstructive surgery on his left ankle. After the surgery, his treating physician recommended that the appellant retire from the police force.

On June 6, 2007, after being evaluated at the Baton Rouge Police Clinic, it was determined that the appellant was permanently disabled from returning to work as a police officer. On June 21, 2007, the MPERS Board of Trustees (the Board) approved the appellant for 100% duty-related disability retirement pursuant to La. R.S. 11:2223(E).[1]

On June 1, 2015, the Board re-evaluated all of its beneficiaries under La. R.S. 11:2223(E), which included the appellant. The appellant was notified by the Board that he would need another medical examination in order to continue receiving his benefits. See La. R.S. 11:220(A). The Board

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[1] Louisiana Revised Statutes 11:2223(E) states, in pertinent part:

(2) Any disability retiree who is blinded or who loses the total use of a limb solely as a result of injuries sustained on or after July 1, 2003, in the performance of his official duties, and whose condition is certified by the State Medical Disability Board, shall receive a benefit equal to his final average compensation. No funds derived from the assessments against insurers pursuant to R.S. 22:1476 shall be used to pay any increased costs or increase in liability of the system resulting from the provisions of this Paragraph.

retained Dr. Douglas Brown, an orthopedic surgeon located in Monroe, Louisiana, to examine the appellant. After the examination, Dr. Brown issued an opinion that the appellant was unable to function as a policeman.

At a meeting held on October 21, 2015, the Board elected to adjust the appellant's disability benefits from 100% of his former salary to 49.38%, which is the rate prescribed by La. R.S. 11:2223(B).[2] On November 12, 2015, the appellant filed a petition for permanent injunction, temporary restraining order, and preliminary injunction, in which he claimed that the Board did not have the right to unilaterally change his disability status that such an action violated due process of law. The appellant requested that the court enjoin the Board from reducing his disability benefits from 100% to 49.38%.

The trial court granted the appellant's request for a preliminary injunction on January 21, 2016. The appellant amended his petition to allege that the Board's October 21, 2015 meeting violated the Open Meetings Law. See La. R.S. 42:17(A). Specifically, the appellant alleged that the Board violated the Open Meetings Law by discussing and adopting

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[2] Louisiana Revised Statutes 11:2223(B) states, in pertinent part:

(1) The board of trustees shall award disability benefits to eligible members who have been officially certified by the State Medical Disability Board as disabled to perform the position held by the member at the time that the disability was incurred or as disabled to perform any other position paying the same salary currently available in the department so long as the disability is not the result of a preexisting condition. Upon receipt of any application for disability retirement, the system shall request from the chief of police the job descriptions of all positions currently available in the department paying the same salary. Such job descriptions shall be submitted to the system within thirty days, or it shall be presumed that no position is available that pays the same salary. The disability benefit shall be determined as provided in this Section.

(2) Upon application for retirement due to a total and permanent disability caused solely as the result of injuries sustained in the performance of his official duties, a member shall receive a disability benefit equal to forty percent of his average final compensation.

(3) Additionally, any member who is entitled to the disability benefit provided by Paragraph (2) of this Subsection, and who has not less than thirteen and one-third years of creditable service, shall receive a supplemental disability benefit equal to three percent of his average final compensation for each year of creditable service in excess of thirteen and one-third years, this supplemental disability benefit not to exceed twenty percent of his average final compensation.

(4) Upon application for retirement due to a total and permanent disability, any member with at least ten years creditable service shall receive a disability benefit equal to three percent of his average final compensation multiplied by his years of creditable service, but not less than forty percent nor more than sixty percent of his average final compensation.

the findings of Dr. Brown without affording the appellant prior notice of the meeting or an opportunity to appear.

At a March 2016 board meeting, the Board discussed the appellant's disability status, this time providing the appellant with prior notice of the meeting. The appellant was present at the meeting and addressed the Board. The Board voted to reduce the appellant's benefits to 49.38%, voted to revoke its decision of the October 21, 2015 meeting, but also voted not to reduce the appellant's benefits until the trial on the injunction was concluded.[3]

Trial on the injunction was held on August 5, 2016. In a judgment signed on October 25, 2016, the trial court dismissed all of the appellant's claims with prejudice and vacated the temporary restraining order and preliminary injunction against MPERS. This appeal followed.

ASSIGNMENTS OF ERROR

The appellant cites three assignments of error:

1. The trial court erred when it ruled that MPERS could reduce the appellant's disability benefit because his in-the-line-of-duty injury occurred before the 2003 amendment to La. R.S. 11:2223(E).

2. The trial court erred when it failed to address any of the other causes of action raised by the appellant in both his petition and second amended petition.

3. The trial court erred when it found that MPERS was within its powers and correct to reduce the appellant's benefits when the statutory language of La. R.S. 11:218-221 and La. R.S. 11:2223(A) and (E)(2) do not give MPERS the authority to do so.

STANDARD OF REVIEW

The reasons of the trial court indicate that it found the Board was within its powers to reduce the appellant's benefits. However, we are bound to review the trial court's judgment, not its reasons. See *Wooley v.*

[3] The only distinction between the Board's decisions of October 21, 2015 and the March 2016 meeting is that it was noted Mr. Brown was given notice and was present at the March 2016 meeting.

Lucksinger, 2009-0571 (La. 4/1/11), 61 So.3d 507, 572. The trial court's dismissal of the appellant's petition for a permanent injunction requires that we use the manifest error standard of review. See *Mary Moe, L.L.C. v. Louisiana Bd. Of Ethics*, 2003-2220 (La. 4/14/04), 875 So.2d 22, 29.

DISCUSSION

First Assignment of Error

The appellant argues that the reconstructive surgery on January 9, 2007 caused the total loss of the use of his leg, not the December 28, 1991 injury; therefore, La. R.S. 11:2223(E)(2) is applicable since the total loss of the use of his leg occurred after July 1, 2003. We disagree with the appellant's interpretation of the statute and only have to read the plain language of the statute to determine its meaning. See *Cleco Evangeline, LLC v. Louisiana Tax Com'n*, 2001-2162 (La. 4/3/02), 813 So.2d 351, 355. The applicability of La. R.S. 11:2223 (E)(2) is triggered by an *injury* sustained on or after July 1, 2003. Upon reading the statute with the common meaning of its language, the total loss of the use of a limb occurring after July 1, 2003 will not make the statute applicable to a retiree if the underlying injury occurred prior to that date. Thus, the question is not when an officer loses the total use of the limb, the question is what is the date of the on-the-job injury that caused the loss of the total use of the limb.

It is established in the record that the appellant was shot in the area of the left foot and ankle on December 28, 1991. He continued his duties as a police officer until 2007, when he underwent reconstructive surgery. Subpart (E)(2) of La. R.S. 11:2223 was added by Legislative Act 610 in 2003, becoming effective July 1, 2003. 2003 La. Sess. Law Serv. Act 610 (H.B. 247). The Subpart specifically applies to retirees under MPERS who "lose total use of a limb *solely* as a result of injuries sustained on or after

July 1, 2003." (emphasis added) Since the appellant's on-the-job injury occurred before July 1, 2003, the Board erred when it approved 100% benefits for the appellant in 2007.

To rectify its error, the Board adjusted the appellant's rate of benefits to conform with La. R.S. 11:2223(B). The Board had authority to do so under La. R.S. 11:192, which provides: "Whenever any state ... or municipal retirement system ... pays any sum of money or benefits to a retiree ... which is not due them, the [Board] *shall* adjust the amount payable to the correct amount." (emphasis added) Thus, the Board was statutorily mandated to adjust the rate to avoid overpayment. See *DiPaola v. Municipal Police Employees' Retirement System*, 2014-0037 (La. App. 1 Cir. 9/25/14), 155 So.3d 49, 53, writ denied, 2014-2575 (La. 2/27/15), 159 So.3d 1071.

Based on the above, we find the trial court did not err in dismissing the appellant's claim with prejudice and vacating the temporary restraining order and preliminary injunction. The appellant's first assignment of error is without merit.

Second Assignment of Error

The appellant argues the trial court erred when it failed to address the other causes of action raised by the appellant in his injunctive action and his second amended petition. The appellant avers the trail court failed to consider the following: (1) the appellant's argument that the Board violated the Open Meetings Law when it failed to give the appellant notice of the October 21, 2015 hearing to reduce his benefits, thus rendering all of the Board's decisions void; (2) the appellant's argument that he was wrongfully denied the recovery of attorney fees that he incurred in order to pursue the Board's violation of the Open Meetings Law; (3) the testimony of Dr.

Douglas Brown, who, according to the appellant, certified the appellant's "condition" as to his loss of the total use of his limb pursuant to La. R.S. 11:2223(A) & (E)(2); and (4) the appellant's argument that the Board's action to reduce the appellant's benefits without due process of law constitutes a violation of 42 U.S.C. § 1983. We note that the judgment did dismiss all of the appellant's claims. Therefore, the trial court did rule on all matters. However, we shall review if dismissing all claims was proper.

Open Meetings Law Violation

The appellant argues that the trial court erred when it did not render judgment for the appellant in light of uncontroverted and stipulated evidence that the Board failed to give the appellant notice of the October 21, 2015 hearing in violation of the Open Meetings Law, thus rendering all decisions relating to the appellant void. The Open Meetings Law is provided in La. R.S. 42:17(A)(1), and states, in relevant part:

> A. A public body may hold an executive session pursuant to La. R.S. 42:16 for one or more of the following reasons:
>
> (1) Discussion of the character, professional competence, or physical or mental health of a person, provided that such person is notified in writing at least twenty-four hours, exclusive of Saturdays, Sundays, and legal holidays, before the scheduled time contained in the notice of the meeting at which such executive session is to take place and that such person may require that such discussion be held at an open meeting."

According to the appellant, the Board's failure to notify him of the October 21, 2015 hearing constituted a violation of the Open Meetings Law. The appellant further cites La. R.S. 42:24, which states that "[a]ny action taken in violation of this Chapter shall be voidable by a court of competent jurisdiction. A suit to void any action must be commenced within sixty days of the action."

The appellant correctly asserts that he was entitled to notice of the October 21, 2015 meeting. Because this notice was not properly given, the Board vacated its October 21, 2015 decision to reduce the appellant's disability benefits at its March 2016 meeting. By vacating the October 21, 2015 decision, the Board rendered the October 21, 2015 decision null and void. Therefore, it is unnecessary for the trial court to void the October 21, 2015 decision. As such, this assignment of error is without merit.

Attorney Fees

The appellant argues that the trial court erred when it did not render judgment in his favor in light of uncontroverted and stipulated evidence that the Board failed to give him notice of the October 21, 2015 hearing to reduce his benefits in violation of the Open Meetings Law, thus denying appellant the recovery of attorney's fees he incurred to protect his rights.

The appellant cites to La. R.S. 42:26, which provides in relevant part that "[i]f a person who brings an enforcement proceeding prevails, he shall be awarded reasonable attorney fees and other costs of litigation." The appellant did not prevail on the merits, therefore, the trial court is not mandated to award attorney fees. We find the trial court did not err in not awarding attorney fees. This assignment of error lacks merit.

Dr. Brown's Testimony

The appellant argues that the trial court erred when it did not render judgment in his favor in light of the uncontroverted testimony of Dr. Douglas Brown, who – pursuant to La. R.S. 11:2223(A) and La. R.S. 11:2223(E)(2) – certified the appellant's "condition" as to the loss of total use of his limb. As expressed above, La. R.S. 11:2223(E)(2) does not apply to the appellant because his original injury occurred in 1991, prior to the 2003 amendment of the statute. Dr. Brown was chosen by the Board to

examine the appellant for the purposes of determining whether the appellant's disability status had changed. Although Dr. Brown found that the appellant had functionally lost the total use of his limb, his findings have no bearing as to whether the appellant's injury occurred before or after the 2003 amendment. Accordingly, this assignment of error is without merit.

42 U.S.C. § 1983

The appellant argues that the trial court erred when it did not find that the Board's action to reduce his benefits was without due process of law and constituted a violation of 42 U.S.C. § 1983. The appellant specifically argues that he was denied due process of the law when he was not notified of the October, 21, 2015 hearing and also denied due process of the law when the Board "rubber stamped" the decision of the October 21, 2015 meeting at its March 16, 2016 meeting.

42 U.S.C. § 1983 does not create substantive rights. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617, 99 S.Ct. 1905, 1916, 60 L.Ed.2d. 508 (1979). Instead, 42 U.S.C. § 1983 provides a civil remedy for the violation of a person's constitutional rights and states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

Accordingly, recovery under 42 U.S.C. § 1983 requires a plaintiff to allege and prove two essential elements: (1) that defendant's conduct occurred under color of state law, and (2) that defendant's conduct deprived him or her of a right, privilege, or immunity secured by the Constitution or a law of the United States. *Kyle v. Civil Service Comm'n,* 588 So.2d 1154,

1159 (La. App. 1st Cir. 1991), writ denied, 595 So.2d 654 (La. 1992) (citing *Moresi v. Dep't of Wildlife and Fisheries*, 567 So.2d 1081, 1084 (La. 1990)).

The first question to decide is whether the Board's conduct in this case occurred under color of state law. The term "color of state law" is synonymous with "state action." *Varnado v. Department of Employment and Training*, 95-0787 (La. App. 1 Cir. 6/28/96), 687 So.2d 1013, 1022. MPERS is a statewide retirement system that provides retirement allowances and other benefits for full-time municipal police officers and employees in the state of Louisiana. Accordingly, the Board's reduction of the appellant's retirement benefits constitutes conduct occurring under color of state law.

The second question is whether the Board's conduct deprived the appellant of a right, privilege, or immunity secured by the Constitution or a law of the United States. Specifically, the appellant argues that his due process rights were violated when he was not notified of the October 21, 2015 hearing. He further argues that the March 16, 2016 meeting was a "rubber stamp" of the October 21, 2015 hearing, and thus, "patently unfair."

Due process requires that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985). Accordingly, it must be determined whether the appellant was deprived of property and if so, whether he was given notice and opportunity for a hearing.

To have a property interest, a person must have a legitimate claim of entitlement to it. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Further, property interests are created and defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure

certain benefits and that support claims of entitlement to those benefits. *Id.* at 577. For example, persons receiving welfare benefits under statutory and administrative standards defining eligibility for them have an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Id.* at 576 (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)). Therefore, welfare recipients have a right to a hearing at which they might attempt to show that they are within the statutory terms of eligibility. *Id.* at 577.

Similar reasoning applies to the present case. The appellant certainly has a property interest in the retirement benefits that he is legally entitled to receive. In regard to the October 21, 2015 hearing, any violation of the appellant's rights due to a lack of notice was remedied when the Board vacated that meeting's ruling. As for the March 16, 2016 meeting, the appellant was notified of this meeting via letter to his attorney dated March 8, 2016. The appellant was also given the opportunity to make, and did make, a presentation at this meeting. We find the appellant did receive notice and had a meaningful opportunity to be heard that was appropriate to the nature of the case at hand. See *Cleveland Bd. of Educ.*, 470 U.S. at 545, 105 S.Ct. at 1495; See also *Brown v. Housing Auth. of New Orleans*, 590 So.2d 1258, 1260 (La. App. 1st Cir. 1991).

The appellant also argues that the March 16, 2016 hearing was patently unfair because the Board held an executive session before the hearing itself. La. R.S. 42:17(A)(2) states:

> A. A public body may hold an executive session pursuant to La. R.S. 42:16 for one or more of the following reasons:
>
> (2) Strategy sessions or negotiations with respect to collective bargaining, prospective litigation after formal written demand, or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public body.

The Board voted to enter executive session at 9:32 a.m. to discuss items 8, 9 and 10 on the agenda. These three items were three separate litigation matters the Board was a party to, including the matter entitled "Paul Brown v. MPERS". The Board returned to regular session at 10:11 a.m. Exhibit D-23. Under La. R.S. 42:17(A)(2), the Board was within its rights to enter executive session to discuss the three pending legal matters; therefore, this assignment of error lacks merit.

Third Assignment of Error

The appellant's third assignment of error does not accurately reflect the trial court's judgment and lacks merit. The trial court did not affirmatively rule that the Board could reduce the appellant's disability benefits pursuant to La. R.S. 11:218-221 or La. R.S. 11:2223(A) and (E)(2). While those statutes outline the procedures for establishing and modifying benefits, the Board's authority to reduce appellant's disability benefits is provided in La. R.S. 11:192.

Regarding the appellant, the Board addressed two issues at its March 2016 meeting. The first issue was recertification of the appellant's disability pursuant to La. R.S. 11:220. That recertification was completed by the Board's acceptance of Dr. Brown's findings that the appellant continued to be totally disabled from the 1991 injury.

The second issue, which is at the center of the instant appeal, addresses the determination of the rate of benefits. At some point during a review of the appellant's case in 2015, the Board reached the determination that the appellant's injury occurred before 2003; however, in 2007, the Board had granted to the appellant 100% disability benefits pursuant to La. R.S. 11:2223(E)(2). As stated above, the 2007 action by the Board was an error on its part, since La. R.S. 11:2223(E)(2) does not apply to the facts of

this case. Rather, La. R.S. 11:2223(B) provided the applicable procedure for determining the appellant's rate of disability benefits. Therefore, as previously discussed, the Board was authorized under La. R.S. 11:192 to adjust the appellant's retiree disability benefits. This assignment of error is without merit.

DECREE

The judgment of the Nineteenth Judicial District Court dismissing all of the claims of the appellant, Paul W. Brown, with prejudice, and vacating the temporary restraining order and preliminary injunction against the Board of Trustees of the Municipal Police Employees' Retirement System, is affirmed. All costs of this appeal are assessed to the appellant, Paul W. Brown.

AFFIRMED.