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Appellate Court Finds Survey Results Not Exempt Under FOIA--As Freedom of Information Act ("FOIA") issues multiply in light of the newly revised statute, the Illinois Appellate Court has weighed in on interpretation of the law specifically with regard to "performance" or "climate surveys."

In Rockford Police Benevolent and Protective Association, Unit #6 v. Morrissey, 2010 WL 298564 (2d Dist. Jan. 22, 2010), the Illinois Appellate Court held that the results of a survey conducted on behalf of a police department were *not* exempt from disclosure under FOIA.

The Rockford police department had asked a Rockford College class in 2007 to conduct an anonymous three-part survey of police officers, civilians and residents to assess the department's performance. The policemen's union submitted a FOIA request for the survey results, which the department denied based on the audit exemption (5 ILCS 140/7(1)(n)) (now at 7(1)(m) under the amended FOIA statute), the self-critical analysis privilege as developed under the federal common law, and the deliberative process/preliminary draft exemption (5 ILCS 140/7(1)(f)).

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School District Liable for Retiree Health Care Benefits Contained in Prior Collective Bargaining Agreements--In a decision potentially impacting all Illinois school districts, the Illinois Appellate Court ruled in Henry Haake, et.al. v. Board of Education for Township High School Glenbard District 87 that the school district *could not* disavow its obligations to pay retirement health care benefits established under expired collective bargaining agreements.

Rather, the court held that the benefits provided by the contracts were part of the promised compensation for which the retired teachers had worked (or agreed to work), they had fully performed their obligations under those contracts, and the school district had benefited from that performance.

The litigation involves health insurance benefits payable to current retirees which the school district sought to modify based on its current collective bargaining agreement to an amount less than the benefits payable to the retirees under the contracts in effect when they retired.

Specifically, the school district had promised its retirees post-retirement health insurance at certain levels via various collective bargaining agreements spanning from 1994-2007. As much as 13 years later for some

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Consumer Price Index

Percent change for the month of **February, 2010**, for the urban wage earners & clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago-Mthly	0.2	0.0
12 Mth	2.5	2.8
St. Louis-6 Mth	1.1	1.6
12 Mth	0.2	0.3
U.S. Mthly	0.0	0.0
12 Mth	2.1	2.8

March CPI figures will be released April 18, 2010. For the most recent CPI, visit our website at: www.hlerk.com

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Reminders & Notes

- IASA and HLERK have joined to issue a FAQ regarding deferred compensation in school administrator contracts. The February publication was issued electronically to all IASA members and was authored by **Heather Brickman** and **Barbara Erickson**. Contact Heather or Barb with your employee benefits inquiries.
- Join **Stan Eisenhammer**, **Mike Loizzi**, and **Stephanie Jones** who will be presenting at the National Council of School Attorneys, School Law Seminar on April 8-10 in Chicago. Later in April, **Bennett Rodick** will chair and **Jay Kraning** will present the "attorneys' panel" at the IAASE Spring Conference on April 30th in Collinsville.

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Benefits Cont.

retirees, the school board decided to decrease those health insurance benefits by increasing premium payments to retirees *after* those CBAs had expired.

The main change in benefits came in 2007 when various changes in CBA language resulted in the school district sending out letters to all retirees stating that all retirees would be required to contribute towards the premium costs of their single health insurance at the same rate as active teachers.

The union did not support the retirees in the grievance process; thus, the retirees sued in court. The school district set forth four arguments in support of its appeal: (1) retirees can't sue to enforce prior CBAs because only the union and the school district signed them; (2) retirees had no vested right to the retiree health insurance benefits in the prior CBAs after those CBAs had expired and, thus, couldn't sue under the theory of contract; (3) even if the right had vested and survived the expiration of the CBAs, subsequent CBAs modified the benefit for some; and (4) certain retirees who did not retire under the ERO (which the school district contended was required to participate in the post-retirement benefit) could not claim the benefit.

In response, the court held that:

- (1) federal law historically provides retirees the right to sue for benefits granted under previous CBAs as third party beneficiaries even though they were not signatories;
- (2) the CBAs expressed the intent that the duration of the retiree health insurance benefits was to extend beyond the expiration of the CBAs even though the language did not so specifically state; the durational terms of "until age 65" or "until Medicare eligibility" set forth terms of age past expiration and retirees vested in the benefit once the school district accepted the irrevocable notice to retire;
- (3) upon vesting, benefits became unalterable unless those who vested in the benefit agreed to a modification, and, here, the retirees did not so agree; and
- (4) the school district's actions in approving early retirees who were not ERO participants waived the requirement that all be ERO participants in order to receive the benefit.

Contact Heather Brickman or Stan Eisenhammer to discuss the employee benefit or labor law implications of this important ruling.

Survey Cont.

In ruling that the survey results were not exempt under FOIA, the appellate court held that the audit exemption was inapplicable and that the self-critical analysis privilege did not provide grounds for withholding documents under FOIA.

The audit exemption (which is unchanged under the amended FOIA) exempts "materials prepared or compiled with respect to internal audits of public bodies"; however, the court noted that most dictionary definitions of "audit" place the word in a financial context, and the survey in this case did not fall within the ordinary meaning of the word "audit."

As for the self-critical analysis privilege, the court reasoned that no such exemption is found among the

enumerated statutory exemptions under FOIA, and the privilege has not been adopted by Illinois courts. Surprisingly, the court did not discuss whether the survey results were exempt under the deliberative process/preliminary draft exemption (which, under the amended FOIA, now requires pre-approval of the Public Access Counselor).

Accordingly, the court ordered the survey results to be released to the union. The court also upheld an award of attorney's fees to the union of over \$14,000.

The amended FOIA creates new potential liability for unwary school districts. If you have questions regarding this decision, or your FOIA obligations in general, please contact Steve Richart or Rob Swain.

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