STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: December 2, 2014)

JOHN SAURO;	:	
KAREN SAURO,	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. PC-2014-3388**
	:	
JAMES LOMBARDI, in his capacity	:	
as Treasurer of the CITY OF PROVIDENCE;	:	
RETIREMENT BOARD OF THE	:	
EMPLOYEES RETIREMENT SYSTEM OF	:	
THE CITY OF PROVIDENCE,	:	
Defendants.	:	

DECISION

CARNES, J. The matter before the Court involves a pension dispute between John Sauro[1] (Plaintiff or Mr. Sauro) and the City of Providence (the City), sued through its treasurer, James Lombardi, as well as the Retirement Board of the Employees Retirement System of the City of Providence (the Board) (collectively, Defendants). Plaintiff has filed a twelve count First Amended Complaint alleging primarily constitutional violations by Defendants in regard to the suspension of his pension. In addition to compensatory damages, permanent injunctive relief, declaratory relief, and attorney's fees, Plaintiff additionally moves this Court for a preliminary injunction requiring the City to restore Plaintiff's pension while this litigation is pending. This Court held a hearing on the preliminary injunction over the course of some five days[2] on October

[1] Karen Sauro, Mr. Sauro's wife, is also listed as a named plaintiff. However, the only claim alleged relative to Ms. Sauro is for loss of consortium. For clarity in this Decision, John Sauro will be referred to as Plaintiff or Mr. Sauro, and Karen Sauro will be referred to exclusively as Ms. Sauro.

[2] Some of the days were not full days due to time spent on other duties of the Court.

1, 2, 3, 6, and 7, 2014. During the hearing, the Court heard from nine witnesses[3] and received seventy-eight exhibits. Jurisdiction is pursuant to G.L. 1956 § 8-2-13 (exclusive jurisdiction of equity actions) and Super. R. Civ. P. 65(a) (preliminary injunction). For the reasons set forth below, this Court denies Plaintiff's Motion for a Preliminary Injunction.

I

Background

A

Background Facts of the Case[4]

On August 5, 1991, Plaintiff was hired as a firefighter with the Providence Fire Department. (First Am. Compl. ¶ 8.) In August of 1998, Mr. Sauro and another unnamed firefighter were carrying a large man down three flights of stairs in a stair chair[5] because the man was having breathing problems. (Tr. at 7-8, Vol. I, Oct. 1, 2014.) At some point, the other firefighter dropped the chair, and the full weight of the chair and its occupant came down on Plaintiff, resulting in an injury to Plaintiff's right shoulder. Id. at 8-9. Mr. Sauro suffered an "acromioclavicular joint separation and focal through and through full thickness rotator cuff tear" in his right shoulder. (First Am. Compl. ¶ 18.)

Mr. Sauro began receiving treatment for his shoulder from an orthopedic specialist, Dr. David Moss. (Tr. at 10, Vol. I, Oct. 1, 2014.) Mr. Sauro's primary care physician, Dr. Tony Wu, and Dr. Moss both prescribed a physical therapy routine for Mr. Sauro because he was not a

[3] Plaintiff testified twice, resulting in ten total witness presentations.

[4] The facts presented in this section are to provide the reader with the context of the proceedings and are not intended to be a full recitation of all facts relevant to the underlying case. Additional factual material will be presented throughout this Decision as necessary.

[5] Plaintiff described a stair chair as a chair with handles and wheels on the back that allows rescue personnel to carry a person down stairs when a stretcher cannot be utilized. (Tr. at 8, Vol. I, Oct. 1, 2014.)

good candidate for corrective surgery. Id. at 10-12. At some later point in time, Dr. Wu indicated to Mr. Sauro that he had reached maximum medical improvement from the physical therapy, but Mr. Sauro would be unable to return to work as a firefighter. Id. at 13-14.

On January 8, 1999, Plaintiff applied for accidental disability retirement[6] with the City. (Defs.' Mem. at 1.) As part of the application process, Mr. Sauro had to undergo three independent medical evaluations (IMEs) with doctors selected by the City. (Tr. at 85-86, Vol. I, Oct. 1, 2014.) All three of the IME doctors, as well as Plaintiff's own doctor, concluded that Plaintiff was permanently disabled as a firefighter. Id. at 17. The Board granted Mr. Sauro accidental disability retirement in October of 2000. Id. at 2.

Under the City of Providence pension ordinance, each year, a disability pensioner is required to submit a recertification of disability from his or her own doctor. Providence City Code § 17-189(8)(a) (2013).[7] Additionally, the City may send a disability pensioner for an IME with a physician of the City's choosing once per year. Id. The option to send a pensioner for an IME has long been part of the pension system, but the recertification process was added to the

[6] Three types of pensions are available to a retired City employee: service pension, ordinary disability pension, and accidental disability pension. A service pension is available based on age and the years of service the applicant provided to the City. Providence City Code § 17-189(1) (2013). An ordinary disability pension is available if the applicant has sustained some injury or illness that prohibits the employee from continuing employment. Id. § 17-189(4). An accidental disability pension is available to an applicant who has become disabled from an employment-related injury. Id. § 17-189(6).

[7] Section 17-189(8)(a) of the Providence City Code states, in relevant part:

> "Re-examination of members retired on account of disability: Once each year the director of personnel may require all pensioners to undergo a medical examination by a physician or physicians engaged by the director of personnel. In accordance with this section, each pensioner shall annually provide certification from a physician of their disability. Should any such pensioner refuse to submit to such examination his or her pension shall be discontinued until his or her withdrawal of such refusal, and should his or her refusal continue for a year, all his or her rights in and to such pension shall be revoked by the retirement board."

ordinance in 2007 after a pension study commission indicated a need to reevaluate disability pensioners regularly. Providence City Council Resolution 2007-49 § 5 (November 8, 2007); see Tr. at 438, Vol. III, Oct. 6, 2014. Mr. Sauro complied with the annual recertification when he began receiving notifications from the City. (Tr. at 442, Vol. III, Oct. 6, 2014.)

Eventually, Mr. Sauro's physical therapy progressed to weight training, first at the therapy office and then later, on Plaintiff's own, in a public gym. (Tr. at 11-12, Vol. I, Oct. 1, 2014.) News reporter Tim White surreptitiously filmed Mr. Sauro during his gym workouts and in April 2011 aired a story on Channel 12 Eyewitness News questioning how Mr. Sauro could be lifting weights and receiving a disability pension. (Exs. 5, 13, 14, 22, 57) The initial story led to a flood of media attention and a City investigation of Mr. Sauro for potential fraud on the pension system. (First Am. Compl. ¶ 25; Ex. 7.) Several officials of the City and the Board[8] made statements to the media either as part of the initial story or follow-up pieces regarding their reaction to the video of Mr. Sauro, generally indicating surprise and a desire to investigate. (Exs. 5, 14, 15.)

Based on the concern that Plaintiff's injury may have healed, the City directed Plaintiff to appear for an IME with Dr. Anthony DeLuise, Jr. on June 7, 2011. (Exs. 6, 7, 8.) Dr. DeLuise's report, which was submitted to the Board, indicated that Mr. Sauro is disabled as a firefighter, but the report also recommended additional testing because Dr. DeLuise did not have access to certain testing equipment and is not qualified to give a psychological evaluation. (Ex. 12.) On July 27, 2011, the Board met to review Dr. DeLuise's report and ordered Mr. Sauro to submit to

[8] Specifically, Board members John Igliozzi, Kerion O'Mara, and James Lombardi were reported as having made statements. Plaintiff's attorney requested that Mr. Igliozzi and Mr. O'Mara recuse themselves from further Board decisions regarding Mr. Sauro, but they refused. (Tr. at 179-82, 261, Vol. I, Oct. 2, 2014.) Mr. Lombardi testified that he did not recall ever being asked to recuse himself. (Tr. at 323, Vol. II, Oct. 3, 2014.)

a functional capacity evaluation based on Dr. DeLuise's recommendations. (Ex. 17.) However, the City also announced publicly that there would be no criminal charges brought against Mr. Sauro in regard to his activities as depicted in news accounts. (Ex. 13.)

Mr. Sauro's attorney filed objections to the Board's order for the additional testing, arguing, inter alia, that the additional testing constituted a second IME, which the Board was not authorized to order under Providence City Code § 17-189(8). (Ex. 21.) Initially, the Board maintained its order for Mr. Sauro to undergo the functional capacity evaluation and ordered Mr. Sauro to obtain a prescription from his doctor for the evaluation. (Ex. 23.) Mr. Sauro went to Dr. Moss, who refused to write the prescription for the functional capacity evaluation because he examined Mr. Sauro and concluded that Mr. Sauro remained disabled and the functional capacity evaluation would serve no purpose. (Exs. 25, 26.)[9] In May of 2012, the Board voted to remove Mr. Sauro from its agenda, and no further tests were ordered. (Tr. at 301-04, Vol. II, Oct. 3, 2014.)

In July of 2013, Mr. Sauro was noticed by the City to attend another IME, this time with Dr. Brian McKeon in Waltham, MA. (Ex. 33.) Plaintiff's attorney objected because the pension ordinance, at that time, required that IMEs "be made at the place of residence of the pensioner or other place mutually agreed upon . . . [,]" and Mr. Sauro did not reside in Massachusetts. (Ex. 34.) In response to this objection, the City cancelled the IME. (Defs.' Mem. at 3.)

On July 31, 2013, the Providence City Council voted to amend the pension ordinance to remove the location restriction for IMEs, among other changes. Providence City Council Resolution 2013-35 § 1 (July 31, 2013). As a result, the pension ordinance was amended to its

[9] Exhibit 25 is a report from The Center for Orthopedics, Inc., but it is not signed by any doctor. The unnamed doctor states that he or she does "not believe that a Functional Capacity Evaluation will change [Mr. Sauro's] ability to perform his everyday duties as a fire fighter."

present form. (Defs.' Ex. A.) In August 2013, Plaintiff was again noticed for an IME with Dr. McKeon to be held on September 13, 2013. (Tr. at 582-83, Vol. IV, Oct. 7, 2014.) Mr. Sauro stated that he consulted with his psychologist, psychiatrist, and colorectal doctor regarding whether to attend the IME, and they ordered him not to attend as it could be life-threatening to him. (Tr. at 61, Vol. I, Oct. 1, 2014.)

On September 10, 2013, Ms. Sauro emailed Ms. Bailey requesting that the IME be cancelled because it was physically and financially impossible for Mr. Sauro to attend as he was bedridden and had been ordered not to travel out of state. (Pl.'s Ex. B.) According to Ms. Bailey, she and Ms. Sauro spoke on the phone on September 12, 2013, and Ms. Bailey indicated to Ms. Sauro that she would reschedule the appointment but would need a note from Mr. Sauro's doctor to validate Ms. Sauro's claims. (Tr. at 390-93, Vol. II, Oct. 3, 2014.) Ms. Sauro testified that she called Dr. Denby—Mr. Sauro's psychiatrist—to request a note. (Tr. at 596-97, Vol. IV, Oct. 7, 2014.) She testified that Dr. Denby stated that he wanted to see Mr. Sauro in person, so she and Mr. Sauro went to Dr. Denby's office. (Tr. at 597-98, Vol. IV, Oct. 7, 2014.) After the appointment with Dr. Denby, Mr. and Ms. Sauro continued to Office Max (to fax Dr. Denby's note to Ms. Bailey), CVS, a gas station, Stop and Shop, and Mr. Sauro's attorney's office. (Tr. at 66-67, Vol. I, Oct. 1, 2014.)

Unbeknownst to Mr. Sauro, the City had hired a private investigator to follow Mr. Sauro starting on September 11, 2013, and continuing for a few days. (Tr. at 516, Vol. III, Oct. 6, 2014.) Brandon Lowe, the private investigator, videotaped Mr. Sauro's activities on September 12, 2013, noting that Mr. Sauro operated the Sauros' vehicle for part of the day. (Ex. 58, at 3-5.) Mr. Lowe also recorded Mr. and Ms. Sauro departing their home again on September 13, 2013, this time stopping at Mr. Sauro's attorney's office. (Ex. 58, at 6.)

The City rescheduled Mr. Sauro's IME with Dr. McKeon for October 16, 2013. (Ex. 41.) On October 15, 2013, Plaintiff's attorney sent an objection to the City, and Plaintiff did not attend the October 16, 2013, IME. (Ex. 43.) In response to Mr. Sauro's failure to attend, the Board again took up the matter of his pension. (Exs. 46, 47.) On December 18, 2013, the Board voted to suspend Mr. Sauro's pension for refusal to attend the IME on October 16, 2013. (Ex. 47.) The instant claim followed with Plaintiff setting forth numerous allegations against Defendants. The Plaintiff now moves for a preliminary injunction to enjoin the City from denying Plaintiff his pension payments.

B

Standard of Review

The decision of whether to grant a preliminary injunction "rests within the sound discretion of the hearing justice." Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (R.I. 1999). In making the determination on a preliminary injunction,

> "the hearing justice should determine whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." Id.

The moving party need not establish the certainty of success on the merits, but he or she does need to make out a prima facie case. DiDonato v. Kennedy, 822 A.2d 179, 181 (R.I. 2003) (citing Fund for Cmty. Progress v. United Way of Se. New England, 695 A.2d 517, 521 (R.I. 1997)).

Although, generally, only a prima facie case is necessary for a preliminary injunction, the standard is heightened if the moving party is seeking mandatory action by the opposing party.

See King v. Grand Chapter of R.I. Order of E. Star, 919 A.2d 991, 995 (R.I. 2007). A mandatory injunction is an injunction that "commands action from a party rather than preventing action." Id. In addition to the four requirements for a preliminary injunction laid out above, a mandatory injunction also requires a "showing of 'very clear' right and 'great urgency.'" Id. (quoting Giacomini v. Bevilacqua, 118 R.I. 63, 65, 372 A.2d 66, 67 (1977)).

C

Summaries of Witness Testimony

Provided here are summaries of the testimony presented at the hearing. These summaries are not intended to replace the comprehensive stenographic record or the copious notes taken by the Court during the hearing. Throughout this Decision, these and other portions of witness testimony, as well as this Court's factual findings and credibility determinations, will be addressed. This summary overview may not include all of those testimony portions or Court determinations.

Plaintiff's witnesses:

1. John Sauro: Mr. Sauro began his testimony with a background on his employment with the Providence Fire Department and the injury which led to his accidental disability pension. He then testified that the City had ordered six IMEs during his employment with the Providence Fire Department—three from the initial injury and three as part of his disability application. He testified that in 2008 or 2009, the City began requiring all disability pensioners annually to recertify their disabilities with their own doctors, which Mr. Sauro complied with when requested. Mr. Sauro then testified about the events leading up to and the aftermath of the Channel 12 news story and resulting "nonstop media attention." (Tr. at 30, Vol. I, Oct. 1, 2014.) Mr. Sauro testified that in June 2011, the City noticed him to appear for an IME with Dr. DeLuise, which he attended. Mr. Sauro testified that the Board reviewed the results of the IME at its July 2011 meeting and ordered Mr. Sauro to undergo more testing, which Mr. Sauro framed as a second IME. Mr. Sauro testified that Board members John Igliozzi and Kerion O'Mara both made public statements against Mr. Sauro, which Mr. Sauro testified indicates that they were biased in their Board votes on his pension. However, Mr. Sauro testified that he never underwent the additional testing because he was required to get a prescription for the test, and his physician, after conducting an exam that Mr. Sauro also describes as an

IME, refused to issue a prescription because the test was unnecessary. Mr. Sauro was then dropped from the Board agenda.

In July 2013, the City again noticed Mr. Sauro to appear for an IME, this time with Dr. McKeon in Waltham, MA, which was rescinded because the IME was outside of Mr. Sauro's state of residence. Mr. Sauro testified as to the City ordinance change[10] allowing for out-of-state IMEs and the subsequent notice to appear for an IME with Dr. McKeon in September 2013. He testified as to the events of September 10 through 13, 2013 regarding cancelling the IME, his wife's communication with Sybil Bailey, and he and his wife's errands during those days. He testified that he was under doctor's orders not to attend the out-of-state IME and "would have probably died" if he had gone. (Tr. at 126, Vol. I, Oct. 2, 2014.) Mr. Sauro testified that his pension was suspended by the Board on December 18, 2013. He testified that as a result of the suspension, he has suffered not only financial harm, but the stress of the City's multiple requests for IMEs has also caused him physical and mental injury.[11]

2. Councilman John Igliozzi: Councilman Igliozzi is a member of the Board and a member of the Providence City Council, among other positions. He holds his Board position because he is the Finance Chair for the Providence City Council. Councilman Igliozzi testified that he has been an advocate for pension reform throughout his sixteen-year tenure with the Providence City Council. He testified that in or around April of 2011, Tim White showed him video of Mr. Sauro lifting weights in a gym, which gave him concerns because he wondered if Mr. Sauro's injury had healed. He testified that he felt the need to "revisit" Mr. Sauro's pension because of his fiduciary duty to the citizens of Providence. (Tr. at 248, Vol. I, Oct. 2, 2014.) However, he testified that he had not made up his mind on whether to suspend Mr. Sauro's pension at the time that Mr. White visited him. Councilman Igliozzi also testified as to his understanding of the City ordinances regarding disability pensions, which, to his recollection, require an IME once per year. He testified that he voted with the Board to request additional testing after the IME report by Dr. DeLuise in 2011 because the evidence was compelling that there may be an issue and he felt that the City needed to investigate further. Councilman Igliozzi also testified that he did not recuse himself from further Board voting regarding Mr. Sauro because he had not prejudged the matter, and he would continue to fulfill his fiduciary duty to the citizens of Providence.

[10] Mr. Sauro testified that this particular ordinance change, as well as a prior ordinance change to allow for disability pensioners to be recalled for light duty in other City departments, and several Board votes were the result of secret dealings and other conspiracies designed specifically to target his pension.

[11] The Court will comment at length, infra, regarding the stress the Plaintiff claims to have undergone, especially as it relates to media attention. See section II(B), infra, especially n.55 and the text related thereto.

3. Kerion O'Mara: Mr. O'Mara is a disabled, retired Providence police officer, and he had been a member of the Board since around 2007.[12] He testified that the Board typically reviews one or two pension applications each month; some are approved and some are denied. Although he could not recall the specific statements that he made in regard to viewing the news story about Mr. Sauro, he stated that the comments quoted in the subsequent news articles were the types of statements that he would have made. Mr. O'Mara testified that he was directly involved with having Mr. Sauro's pension added to the Board agenda for reconsideration because he believed that there was a need to examine the situation further.[13] Mr. O'Mara acknowledged that Plaintiff's attorney asked him to recuse himself from Mr. Sauro's matter and Mr. O'Mara refused. Mr. O'Mara testified—upon examining Dr. DeLuise's written report—that he recalled that Dr. DeLuise recommended additional testing for Mr. Sauro. Mr. O'Mara testified that his only concern after reading Dr. DeLuise's report was that Mr. Sauro undergo additional testing. Mr. O'Mara additionally testified that he was aware of news stories related to other disability pensioners, but that Mr. Sauro was the only one that he felt required further investigation. Mr. O'Mara additionally testified that he has known Mr. Sauro and his family for a long time, and Mr. Sauro's brother, Tony, helped save Mr. O'Mara's life when he was shot in the line of duty. He testified that he has no animosity towards Mr. Sauro or any member of the Sauro family. Additionally, Mr. O'Mara stated that he had retired from the Board prior to the December 18, 2013 vote that resulted in the suspension of Mr. Sauro's pension.

4. James Lombardi: Mr. Lombardi has been the treasurer of the City for three and a half years, and he has been a member[14] of the Board during that time. Mr. Lombardi testified that the Channel 12 news story left him surprised and concerned, and he testified that he wanted to investigate Mr. Sauro's injury status. Mr. Lombardi testified that he voted to keep Mr. Sauro on the Board agenda around May 2012, but the remainder of the voting Board members approved removal. He testified that after that vote he spoke with the media and indicated that the Board should have pursued the matter further and suspended Mr. Sauro's pension until he submitted to additional testing.[15] However, Mr. Lombardi stated that he approaches each decision on the Board with a fair and impartial mindset, and he only called for a suspension of Mr. Sauro's pension because Mr. Sauro had refused to comply with the Board's order for medical exams.

5. Sybil Bailey: Ms. Bailey is the director of Human Resources for the City. Her department[16] is responsible for noticing pensioners of recertification and IME requests as

[12] For at least a portion of his time on the Board, Mr. O'Mara was a member of the medical subcommittee.

[13] Mr. O'Mara indicated that he wanted to investigate Mr. Sauro's pension but had not yet decided whether it should be revoked.

[14] Mr. Lombardi is also the chairman of the Board's medical subcommittee.

[15] The testing referenced here is the order for the functional capacity evaluation that the Board issued after reviewing Dr. DeLuise's IME report.

[16] Ms. Bailey frequently testified that the day-to-day actions of her office in regard to IMEs and recertification are handled by her confidential assistant, Jennifer Conrad.

well as selecting the doctors for IMEs. Ms. Bailey testified that her office will sometimes send requests of their own accord without an order from the Board.[17] Her office maintains a list of doctors that they utilize for IMEs as well as for workers' compensation examinations. When an examination is needed, her office will contact the doctor first to be sure that the doctor is willing to examine the employee. Ms. Bailey testified that a pension study commission revealed the need to reexamine disability pensioners, which resulted in the annual recertification process to supplement the as-requested IMEs. Ms. Bailey testified that the recertification and IME process was put on hold during 2012 because the City was dealing with changes in Medicare and with pension litigation. In 2013, they just picked up where they left off.[18]

With regard to selecting Dr. McKeon in 2013, Ms. Bailey testified that the office would have been looking for an orthopedic surgeon and a doctor that was distanced from the media hype of Mr. Sauro's case. She testified that Dr. McKeon was probably not on their reference list, but she believes that Ms. Conrad received a referral from the Deputy Commissioner of Public Safety, Michael O'Toole. Ms. Bailey testified that she was unaware that IMEs must be scheduled at a pensioner's place of residence until she received Mr. Sauro's objection to the July 2013 IME in Waltham, MA. In response to that objection letter, Ms. Bailey's office cancelled the July 2013 IME with Dr. McKeon. Ms. Bailey testified that she then received a copy of a letter from City Solicitor Chiavarini that the ordinance had been amended and IMEs were no longer limited to the place of residence.

Ms. Bailey also testified about the communications with Karen Sauro regarding the rescheduled September 13, 2013 IME. Ms. Bailey received an email from Ms. Sauro on September 10, 2013 indicating that it would be physically and financially impossible for Mr. Sauro to attend the IME. Ms. Bailey testified that she authorized surveillance on Mr. Sauro for September 11 through 13, 2013 because she and Ms. Conrad were concerned that Mr. Sauro would not attend the IME.[19] She testified that they hired Brandon Lowe for the surveillance, whom she had hired many times before for city surveillance for workers' compensation and disciplinary matters. Ms. Bailey also testified that she had a lengthy telephone conversation with Ms. Sauro on September 12, 2013, during which she requested that Ms. Sauro submit a note from one of Mr. Sauro's doctors[20] supporting her

[17] Ms. Bailey testified that she hardly ever speaks with members of the Board, and most of the relevant communications are with City Solicitor Kenneth Chiavarini.

[18] After reviewing her notes between hearing days, Ms. Bailey testified that she remembered wanting to send Mr. Sauro for another IME—which was permitted given that it had been over a year since the last IME—because the additional testing recommended by Dr. DeLuise had never occurred.

[19] Ms. Bailey testified that her concerns were elevated when she received Ms. Sauro's September 10, 2013 email that indicated that Ms. Sauro was frequently home alone even though Ms. Sauro had also indicated that Mr. Sauro is bedridden.

[20] Ms. Bailey testified that she had assumed that Mr. Sauro would not have to leave the house to get a doctor's note because if he was bedridden and on suicide watch as Ms. Sauro had indicated,

claim that Mr. Sauro was unable to attend the IME. She testified that the surveillance documented Mr. Sauro leaving the house and driving on both September 12 and 13, 2013.

Ms. Bailey testified that she rescheduled Mr. Sauro's appointment with Dr. McKeon to October 16, 2013. Ms. Bailey referred Mr. Sauro's case to the Board after he failed to appear for the October 2013 IME. She additionally testified that she attended the December 18, 2013 Board meeting. She initially testified that she did not believe that she spoke or brought anything with her to the meeting, but she later indicated that she did speak at the meeting regarding her conversation with Ms. Sauro. Ms. Bailey also testified that she has sent other disability pensioners for IMEs, including two prior to 2011, and she has requested additional medical documentation from others when she did not feel that a full IME was required.

6. Brandon Lowe: Mr. Lowe is a licensed private investigator and the Director of Investigations for his company, Interstate Investigations. He testified that on September 10, 2013, he received a telephone call from Ms. Conrad who requested that Mr. Lowe monitor Mr. Sauro for the next three to five days. Mr. Lowe testified that he has frequently done surveillance work for the City, he has no contract or fee agreement[21] with the City, and he is frequently given discretion in how much surveillance is necessary. Mr. Lowe testified that he has done thousands of surveillance jobs, and he does not form opinions of the parties that he follows. Mr. Lowe testified that he did not see Mr. Sauro leave the house on September 11, 2013. Mr. Lowe testified from his notes that on September 12, 2013, he observed Mr. and Ms. Sauro depart their home in a Jeep Wrangler.[22] He testified that over the next few hours, he observed Mr. and Ms. Sauro visit an office in Warwick, Office Max, Stop and Shop, and CVS. Mr. Lowe additionally testified that he continued his surveillance of Mr. Sauro on September 13, 2013, and he observed Mr. and Ms. Sauro again leave their home, with Mr. Sauro driving for part of the day. Mr. Lowe testified that—although he has no medical training—he did not observe any outward signs of pain or discomfort from Mr. Sauro throughout the surveillance.

7. Karen Sauro: Ms. Sauro is Mr. Sauro's wife of eighteen years. Ms. Sauro testified that Mr. Sauro's mental and physical health had significantly deteriorated over the summer of 2013, and both she and Mr. Sauro were frequently bedridden and taking drugs with sedative effects. She testified that she was concerned with her husband attending the September 13, 2013 IME, specifically because neither of them could drive that long of a distance, and Mr. Sauro might suffer a "stroke, heart attack, a nervous breakdown, [or] go into a psychosis" if he had to travel that far. (Tr. at 590, Vol. IV, Oct. 7, 2014.) Ms.

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he would likely be under regular doctor's care. She believed the doctor would be able to fax documentation without having to see Mr. Sauro in person.

[21] Mr. Lowe did testify that his fee is $75 per hour, but he was not given a specific allotment of hours for the surveillance job.

[22] At times, Mr. Lowe testified that he observed a bright green Jeep Wrangler and at other times he testified that he observed a black Jeep Wrangler.

Sauro testified that she emailed Ms. Bailey on September 10, 2013 regarding cancelling the September 13, 2013 IME, and she did not receive a response on September 10 or 11, 2013. Ms. Sauro testified that she called Ms. Bailey on September 12, 2013, and Ms. Bailey told her that she would need a doctor's note faxed by the end of the business day in order to cancel the IME. Ms. Sauro then detailed the time that she and Mr. Sauro spent outside of the house that day, and the letter that she received from Ms. Bailey via email when they arrived home. Ms. Sauro testified that on September 13, 2013, Mr. Sauro suffered "some kind of attack" while they were out of the house because he believed they were being followed. (Tr. at 610, Vol. IV, Oct. 7, 2014.) Ms. Sauro also testified that she and Mr. Sauro were living in Florida shortly before the July 2013 notice of the out-of-state IME. Ms. Sauro testified that she did not believe Mr. Sauro would have been able to attend an IME even if it had been in Cranston, their city of residence.

8. Carl Richards: Mr. Richards is a firefighter with the Providence Fire Department. He also became a Board member in October 2013, after being elected by his fellow Providence Fire Department union members. Mr. Richards testified that he had viewed the Channel 12 news story and that it "looked bad" but "situations like that are multidimensional . . . not just face value." (Tr. at 655, Vol. IV, Oct. 7, 2014.) Mr. Richards received a copy of Plaintiff's medical records from Plaintiff's brother, Rocco. He testified that he spoke with Plaintiff on the morning of the December 2013 Board meeting and informed him that "his not going to the doctor's appointment, by city ordinance, it was clear that it was, in effect, refusal to go." (Tr. at 656-57, Vol. IV, Oct. 7, 2014.) Mr. Richards admitted that he had made up his mind on how he would vote after reviewing Plaintiff's medical records and the City ordinance, before even viewing the surveillance video at the Board meeting. He testified that he attended the December 18, 2013 Board meeting and voted to suspend Plaintiff's pension. He further testified that he spoke with Rocco Sauro at some point after the meeting, who was upset about Mr. Richard's vote. He informed Rocco Sauro that he had voted based on the evidence presented and the language of the pension ordinance. He stated that he explained to Rocco Sauro that "public perception [of Plaintiff] is that he is the poster boy for, you know, pension fraud." (Tr. at 662, Vol. IV, Oct. 7, 2014.)

9. Rocco Sauro: Rocco Sauro[23] is Plaintiff's brother. He is a Lieutenant with the Providence Fire Department, where he has worked since March 16, 1992. Rocco Sauro testified that there are no light duty positions available to a firefighter on an accidental disability pension; rather, the light duty positions are reserved for active firefighters who will be returning to full service. Rocco Sauro stated that in November 2013 he provided a copy of Plaintiff's medical records to Carl Richards so that Mr. Richards could "get up to speed on his case" before it went before the Board. (Tr. at 675, Vol. IV, Oct. 7, 2014.) Rocco Sauro met with Mr. Richards again in January 2014 to express his displeasure with Mr. Richards' vote at the December 2013 Board meeting. According to Rocco, Mr. Richards stated that he had to vote against Plaintiff, who was "going to be the poster boy for disability pension fraud," and that Mr. Richards would have lost his credibility with

[23] To distinguish him from Plaintiff, Rocco Sauro will be referred to as "Rocco" rather than "Mr. Sauro." No disrespect is intended.

the Board if he had voted in Plaintiff's favor. (Tr. at 676, Vol. IV, Oct. 7, 2014.) Rocco Sauro testified that Plaintiff could not perform the duties of a firefighter in his condition, but, on cross-examination, he admitted that he has never personally reviewed Plaintiff's medical records.

10. John Sauro: Upon second examination, Mr. Sauro was presented with several documents by Plaintiff's attorney related to Mr. Sauro's current medical conditions as well as his medical conditions at other times relevant to this case. Mr. Sauro additionally testified to the health benefits (physical and mental) that he had been experiencing from working out at the gym. He has not returned to a gym since the news story aired in April 2011. On cross-examination, Mr. Sauro indicated that several of his medical problems were related to the stress of the dispute with the City over his pension, including his right knee pain, his colorectal disease, and his right hip pain. Mr. Sauro testified that Dr. Porto had informed him that driving while taking his sedative medications would be dangerous, but that she indicated short trips were okay when he felt that he could manage it. Mr. Sauro stated that he had no choice but to drive because he had no other way to get to his doctors' appointments and other necessary errands. Additionally, Mr. Sauro testified that he would not have attended the September 2013 IME even if the doctor had been located in Rhode Island because City ordered IMEs are "post traumatic stress disorder triggers." (Tr. at 724, Vol. IV, Oct. 7, 2014.) However, Mr. Sauro maintained that he had "never refused an IME, ever." (Tr. at 726, Vol. IV, Oct. 7, 2014.) He additionally testified that his understanding of Providence City Code § 17-189 is that if one disability pensioner is sent for an IME, all disability pensioners must be sent.

II

Analysis

For this Court to grant the requested preliminary injunction, the Court must find that (1) Mr. Sauro has demonstrated a reasonable likelihood of succeeding on the merits of his case; (2) Mr. Sauro will suffer irreparable harm if his pension is not restored; (3) upon balancing the equities in the case, including the public interest, the balance favors Mr. Sauro; (4) issuance of the injunction will preserve the status quo; (5) Mr. Sauro has a very clear right to return of his pension; and (6) Mr. Sauro has a great urgency in having his pension reinstated. See King, 919 A.2d at 995; Iggy's Doughboys, Inc., 729 A.2d at 705.

The Court's findings and conclusions are for the purposes of the preliminary injunction only, based on the testimony and exhibits presented at the hearing. The Court is aware that

litigation in this case will continue, and the findings may change as new facts are brought forth during discovery and at trial. This Decision does not purport to address the merits of whether Plaintiff is entitled to his disability pension. That is the prerogative of the Board, and the instant matter is not an appeal of the Board's decision. The inquiry for the instant Decision only extends to whether the Court should, in the exercise of its discretion, afford equitable relief in the form of ordering the Board to reinstate the Plaintiff's pension benefits. Other than such equitable relief, the Court has no jurisdiction to determine the merits of the Board's action on an appeal.

A

Likelihood of Success on the Merits

In his First Amended Complaint, Plaintiff advances several theories of recovery based on various alleged actions by Defendants since 2011. Most of Plaintiff's causes of action that were developed at the hearing are rooted in alleged federal constitutional violations. The Plaintiff's federal claims are brought under 42 U.S.C. § 1983.[24] This Court addresses each cause of action in turn below.

1

Due Process

The Plaintiff's allegations of harm by Defendants predominately relate to Count II of the First Amended Complaint: violations of Plaintiff's due process rights. Plaintiff alleges that he

[24] In pertinent part, 42 U.S.C. § 1983 provides:

> "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 . . . ."

was denied a fair hearing by the Board on multiple occasions[25] because members of the Board[26] were prejudiced against Mr. Sauro and refused to recuse themselves. Plaintiff claims that the Board exceeded its authority in ordering (1) the functional capacity evaluation in 2011 and (2) the IME in 2013. Plaintiff also claims that the December 2013 Board meeting—at which his pension was suspended—constituted an unfair hearing because the Board ignored the controlling law on what constitutes "refusal" of an IME, and Mr. Sauro was not provided a written decision setting forth the Board's findings of fact and conclusions of law.

a

Procedural Due Process: Notice and Opportunity to be Heard

The Fourteenth Amendment to the United States Constitution states that no state shall "deprive any person of life, liberty, or property, without due process of law." One "essential principle of due process" is that the deprived party must receive notice and be given an opportunity to be heard prior to the deprivation. State v. Germane, 971 A.2d 555, 579 (R.I. 2009) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)). Mr. Sauro's pension was suspended at the December 18, 2013 Board meeting. The Board sent a notice to Mr. Sauro prior to the Board meeting informing him that the Board would be discussing his "physical health/mental health" at that meeting. (Ex. 46.) Although Mr. Sauro did not personally attend that meeting, he was afforded an opportunity to attend. See Germane, 971 A.2d at 579 (citing Loudermill, 470 U.S. at 542). Mr. Sauro's attorney, Joseph Voccola, did

[25] The Board meetings at issue occurred on September 28, 2011, May 29, 2012, and December 18, 2013.

[26] Plaintiff specifically alleges that the following Board members should have recused themselves: Councilman Igliozzi (September 2011 and December 2013), Mr. O'Mara (September 2011), Mr. Lombardi (May 2012 and December 2013), Mr. Richards (December 2013), the two unnamed subordinates of Public Safety Director Steven M. Pare (December 2013), and any unnamed members appointed by Mayor Taveras (December 2013).

attend the meeting and spoke on Mr. Sauro's behalf. (Ex. 54.) Therefore, Mr. Sauro was at least provided with the minimal due process requirements of notice and an opportunity to be heard before his pension was suspended.

b

Procedural Due Process: Prejudice of Board Members

The Plaintiff contends that even if he was afforded an opportunity to be heard at the December 18, 2013 and other Board meetings, those opportunities did not constitute a fair hearing because several members of the Board were prejudiced against Plaintiff.[27] The Plaintiff contends that a fair hearing is one of the essential tenants of procedural due process, and therefore, prejudiced Board members' failures to recuse themselves denied Plaintiff of his right to a fair hearing.

The Board, like an administrative agency, carries out a quasi-judicial function, which requires that the Board members meet an "obligation of impartiality on par with that of judges." Champlin's Realty Assocs. v. Tikoian, 989 A.2d 427, 443 (R.I. 2010). The members "must not be 'biased or otherwise indisposed from rendering a fair and impartial decision.'" Id. (quoting Davis v. Wood, 444 A.2d 190, 192 (R.I. 1982)). Adjudicators are afforded a presumption of integrity and impartiality. Champlin's Realty, 989 A.2d at 443. However, that presumption may be overcome. One such way to overcome the presumption would be by a showing that the

[27] At the outset of this discussion, we note that Plaintiff partially alleges a due process violation in that some Board members who voted to suspend his pension had previously voted against Mr. Sauro in other Board proceedings, indicating prejudice against Mr. Sauro. However, a member of a board or other agency is not de facto prejudiced against a party merely because he or she voted against that party in a prior proceeding. N.L.R.B. v. Donnelly Garment Co., 330 U.S. 219, 236-37 (1947) (refusing to find that agency decision-makers are "disentitled to sit because they ruled strongly against a party in [a prior] hearing").

adjudicator has become involved in building one party's case. Id. (citing Kent Cnty. Water Auth. v. State (Dep't. of Health), 723 A.2d 1132, 1137 (R.I. 1999)).

An adjudicator is not automatically biased "simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976) (citing United States v. Morgan, 313 U.S. 409, 421 (1941)) (finding no bias in school board firing teachers for striking even though the board had been the party negotiating with the teachers prior to the strike because the board was acting in its duties to protect the educational system for the public and no evidence was presented that the board members' prior involvement resulted in bias against the teachers).

The Board itself is designed to minimize prejudicial influence by its diverse membership. Councilman Igliozzi testified as to the "eclectic mix of different stakeholders." (Tr. at 153, Vol. I, Oct. 2, 2014.) He explained that the Board is made up of public appointees, mayoral appointees, council members, council appointees, and union appointees, including active and retired union members. (Tr. at 153-54, Vol. I, Oct. 2, 2014.)[28] By including representatives of various interests, the Board ensures a mixture of viewpoints will be factored into its proceedings. However, each member of the Board must still be free of personal bias or prejudice in order to ensure a fair hearing. See Champlin's Realty, 989 A.2d at 443 (citing Davis, 444 A.2d at 192).

Mr. Sauro first claims that Councilman Igliozzi made public statements against Mr. Sauro, including indicating that he was defrauding the pension system. (First Am. Compl. ¶ 27.)

[28] The pension ordinance calls for the Board to be composed of (1) the city treasurer or his/her designee; (2) the city finance director; (3) two city council appointees; (4) two mayoral appointees; and (5) six representatives of present and retired city employees, broken down by class and active/retired status. Providence City Code § 17-183(2).

The evidence demonstrates that reporter Tim White contacted Councilman Igliozzi to discuss Mr. Sauro and show the undercover video to the Councilman. (Tr. at 146, Vol. I, Oct. 2, 2014.) Councilman Igliozzi testified that he was concerned by the video because "these are the types of events that happen that hurts the system." Id. at 147. He was concerned that Mr. Sauro may have been rehabilitated from his injury but was continuing to collect his disability pension. Id.

Councilman Igliozzi remembered making statements of his concern to the media; although he could not recall the exact statements, he stated that those quoted by Plaintiff[29] were likely accurate. Id. at 148-50. Additionally, Plaintiff contends that Councilman Igliozzi took direct action against Plaintiff by orchestrating the July 2013 ordinance amendment specifically to target Plaintiff, basing his claim on evidence that Councilman Igliozzi approached the council president at the meeting and whispered to him with the microphone covered. (Tr. at 92, Vol. I, Oct. 1, 2014.) Plaintiff requested that Councilman Igliozzi recuse himself from Board proceedings in September 2011 and December 2013, but Councilman Igliozzi refused. (First Am. Compl. ¶¶ 60, 61, 129.)

This Court finds, based on the presented testimony, that Councilman Igliozzi wanted to have the Board review Mr. Sauro's pension after viewing Mr. White's undercover video. Although Councilman Igliozzi desired immediate review, this Court finds that he had not made an advance decision on the desired outcome of that review.[30] The desire to review a case without prejudging it does not rise to a level of concern in regard to due process. See Hortonville Joint Sch. Dist., 426 U.S. at 493. Additionally, this Court finds that there was insufficient evidence

[29] Councilman Igliozzi agreed that he said "something to the effect of" (1) "[i]t's just another sad example of someone taking advantage of the Providence taxpayer," and (2) "it's clear that the individual's accidental disability needs to be revisited immediately." (Tr. at 150, Vol. I, Oct. 2, 2014.)

[30] Councilman Igliozzi testified that he had not made up his mind on the final outcome when Mr. White visited him. (Tr. at 251, Vol. I, Oct. 2, 2014.)

presented to show that Councilman Igliozzi effectively advocated against Mr. Sauro by his involvement in amending the pension ordinance, specifically because Councilman Igliozzi explained that city council members frequently engage in side conversations during the legislative process of the meetings. (Tr. at 205-06, Vol. I, Oct. 2, 2014.); see Champlin's Realty, 989 A.2d at 441 (finding improper conduct by a Coastal Resource Management Council member serving a quasi-judicial function, partially based on ex-parte communications between the member and the Governor, to obtain his approval on the intended case outcome and then lobbying or threatening other council members to obtain their assent).

The Court finds that Councilman Igliozzi's response to the Channel 12 news report is an understandable response from a city official—particularly, the finance chair on the city council—given the importance of pension funding to the public. Our Supreme Court has recognized, albeit in a different context, that a public pension dispute constitutes a legitimate public interest. In Leddy v. Narragansett Television, L.P., the defendant aired a news report questioning the integrity of a disabled firefighter who was collecting a pension as well as a salary for a new position as a fire investigator. 843 A.2d 481, 484-85 (R.I. 2004). The Supreme Court held that the report was not defamatory, partially because the subject matter, government pensions, was a "legitimate public interest." Id. at 488 (emphasis added). In yet another context, in Nonnenmacher v. City of Warwick, retired firefighters claimed violation of the contract clause when the city allegedly made arbitrary changes to its pension ordinance such that disability pensions would be reduced if the pensioner obtained outside employment. 722 A.2d 1199, 1201 (R.I. 1999). The Supreme Court held that even if the plaintiffs had a vested right in their pensions, the ordinance amendment was not arbitrary because it was "a reasonable means of

fulfilling an important public interest . . . to protect the solvency of the city's pension system." Id. at 1203-04 (citations omitted) (emphasis added).

Based on the recognition that protecting municipal pension funds constitutes a legitimate public interest, Councilman Igliozzi's reaction to Mr. White's video of Mr. Sauro is understandable and does not constitute a showing of prejudice. Councilman Igliozzi is the finance chair for the City Council, and this position also places him on the Board. As such, he has a special interest in ensuring the integrity of the City's pension fund. This fiduciary responsibility legitimizes his desire to investigate Mr. Sauro's condition.[31] Additionally, by virtue of his position as finance chair, Councilman Igliozzi was in a position to draft and introduce legislation affecting the pension ordinance. Without more, that legislative action would not disqualify him from voting on questions of Mr. Sauro's pension. The Court finds that Plaintiff has not demonstrated a likelihood of success on the merits on his claim of prejudicial hearing by virtue of Councilman Igliozzi's involvement.

The Plaintiff also claims that Mr. O'Mara was prejudiced against Mr. Sauro. (First Am. Compl. ¶¶ 60, 61.) Mr. Sauro alleges that Mr. O'Mara demonstrated his prejudice by storming out of a Board meeting after learning of the results of the June 2011 IME and later indicating to Mr. White that he was "outraged" by the results. (First Am. Compl. ¶¶ 66, 67.) At the hearing, Mr. O'Mara did testify that he was "very upset" when he initially viewed Mr. White's video, and he wanted the Board to review Mr. Sauro's pension. (Tr. at 254, Vol. I, Oct. 2, 2014.) Mr. O'Mara additionally admitted to making public statements of outrage and concern over the status

[31] Councilman Igliozzi testified that "the public helps fund this system, if they don't have faith when they submit their tax dollars that the money is going to the system correctly and it's being allocated accordingly then the public loses faith in how the process is happening and then questions everything." (Tr. at 221, Vol. I, Oct. 2, 2014.) The Court finds the testimony on this point credible.

of Mr. Sauro's disability, but he stated that those comments were made prior to reviewing Dr. DeLuise's IME report. Id. at 255-56, 265. Additionally, Mr. O'Mara testified that, although he was adamant about reviewing Mr. Sauro's pension, he had not made a decision on his desired result and he had no animus towards Mr. Sauro.[32] (Tr. at 282-83, Vol. II, Oct. 3, 2014.)

This Court finds, based on the testimony and evidence presented at the hearing, that Mr. O'Mara was not prejudiced against Mr. Sauro. This Court finds Mr. O'Mara to be a highly credible witness. Mr. O'Mara candidly admitted to anger and concern upon first viewing Mr. White's video,[33] but he indicated that, even if upset, he could still make an impartial decision as a member of the Board. Id. at 297-98; contra Champlin's Realty, 989 A.2d at 445 (upholding the trial justice's finding of a Coastal Resource Management Council member's bias because he "settled on a desired outcome long before the full council hearing and that he worked tirelessly to advance it." This is not the case now before the Court with Mr. O'Mara.) Additionally, it is worth noting that Mr. O'Mara had retired from the Board prior to December 18, 2013. Therefore, even if he were prejudiced against Plaintiff, that prejudice could not have impacted the Board's decision to suspend Plaintiff's pension. This Court accordingly concludes that Mr.

[32] In fact, Mr. O'Mara testified that he has known Mr. Sauro's family for a long time, and Mr. Sauro's brother Tony helped save Mr. O'Mara's life. (Tr. at 282, Vol. II, Oct. 3, 2014.) The Court also finds this testimony credible.

[33] Even Dr. DeLuise describes concern and disappointment upon his first viewing of the news clip. In his report, he writes:

> "I was able to review the video news clip provided to me. I actually saw it by chance when it first aired on television. Mr. Sauro was lifting and pushing a fair amount of weight. My initial response to seeing this was that this patient was manipulating a broken disability benefits system and it disappointed me. Fortunately, I am very able to remain objective for the task at hand." (Ex. 12, Report of Dr. Anthony M. DeLuise Jr., June 20, 2011, at 3, ¶ 6.)

Sauro is not likely to succeed on the merits of his due process claim based on allegations that Mr. O'Mara was prejudiced against him.

The Plaintiff additionally claims that Mr. Lombardi's refusal to recuse himself violated Plaintiff's due process rights. (First Am. Compl. ¶¶ 130, 133.) Mr. Sauro alleges that, after a May 2012 Board vote to remove Mr. Sauro from the agenda, Mr. Lombardi—the sole dissenter—made public statements that the Board should have suspended Mr. Sauro's pension for his refusal to undergo the additional testing that the Board had ordered. (First Am. Compl. ¶ 81.) During the hearing, Mr. Lombardi admitted that he would have voted to suspend Mr. Sauro's pension in May 2012, but he explained that his reasoning was that Mr. Sauro refused to submit to tests ordered by the Board. (Tr. at 304, Vol. II, Oct. 3, 2014.) Mr. Lombardi testified that he does not personally know Mr. Sauro, he has no bias against him, and upon viewing Mr. White's video, he only sought to have the Board review Mr. Sauro's pension, not necessarily revoke it. Id. at 316-17.

Again, this Court finds in its discretion, based on the evidence and testimony presented at the hearing, that Mr. Lombardi was not prejudiced against Mr. Sauro. Therefore, Mr. Lombardi's participation did not taint the Board's hearing. Although Mr. Lombardi did make statements that he believed the Board should suspend Mr. Sauro's pension, he was very clear and credible during his testimony that those statements were made because Mr. Sauro had failed to submit to testing ordered by the Board. Although Mr. Lombardi advocated for suspension of Plaintiff's pension until he submitted to the testing, his actions did not rise to the level of a prejudiced adjudicator lobbying against a person before that adjudicator. See Champlin's Realty, 989 A.2d at 444-45 (upholding a finding of bias in two members of the Coastal Resources Management Council because they independently advocated for particular sides in a contested

matter before the council, including entering the council hearings with already-established decisions on the proper outcome of the case, lobbying other council members, and even threatening some members). Again, this Court notes that Mr. Lombardi—like Councilman Igliozzi—has a special interest in ensuring the integrity of the pension fund because he is the City Treasurer. Viewing Mr. Lombardi's actions through the prism of his position further justifies his concern for investigating Mr. Sauro's medical condition. As such, the Court finds that Mr. Sauro has not demonstrated a likelihood of success on the merits of his claim that Mr. Lombardi's involvement in the Board proceedings constituted a violation of due process.

The final Board member that Plaintiff alleges was prejudiced in his participation was Carl Richards. According to Plaintiff, Mr. Richards had decided to vote against Plaintiff prior to the Board meeting, before he heard any evidence on the matter. Although Mr. Richards did testify that he had made his decision before seeing the surveillance video produced at the meeting, he additionally testified that Plaintiff's brother had provided him with Plaintiff's medical records prior to the meeting and both Plaintiff and his brother had advocated Plaintiff's position to Mr. Richards. (Tr. at 654-55, 664-65, 670, Vol. IV, Oct. 7, 2014.) Mr. Richards testified that he made up his mind upon reviewing those medical records and the pension ordinance. (Tr. at 655, 657, 669, Vol. IV, Oct. 7, 2014.) Although Mr. Richards made a decision before attending the physical Board meeting, he did so based on evidence provided to him by Plaintiff, unlike the biased adjudicators in Champlin's Realty, who not only made their decisions in advance of the council hearing but also advocated for their side, including threatening other council members. 989 A.2d at 444-45. There is no evidence before this Court that Mr. Richards took any action against Mr. Sauro other than personally voting against him after considering evidence provided

to him by Plaintiff's brother, a fellow firefighter.[34] The Court finds Mr. Richard's testimony credible and concludes that Plaintiff has not demonstrated a likelihood of success on the merits of his claim that Mr. Richard's involvement in the Board proceedings violated Plaintiff's due process rights.

The evidence does not demonstrate that any of the members of the Board prejudged Mr. Sauro's case or independently advocated for a particular outcome. Although the members discussed herein advocated for review of Mr. Sauro's pension, this Court finds, for the purposes of this Motion, that they did so in furtherance of their duties to the City's taxpayers to ensure protection of the pension fund. See Hortonville Joint Sch. Dist., 426 U.S. at 495-96. All of the Board members have a duty to the City's taxpayers to investigate potential pension fraud, and their actions were reasonable in light of that duty. See Nonnenmacher, 722 A.2d at 1203-04 (holding that it was reasonable for the city to reduce pension payments when a pensioner obtains outside employment because of the legitimate public interest in maintaining the solvency of the pension fund). The Board is composed of a diverse array of representation specifically to serve this function while maintaining a balance of interests. Although some of the statements made to the media were more forceful than necessary, such statements are understandable coming from a public official seeking to reassure the public that he or she is watching out for the taxpayers. Although a jury may reach different conclusions after a full trial, the testimony presented to this Court was insufficient to lead to a conclusion that Mr. Sauro has established a prima facie case

[34] Mr. Sauro additionally alleges violation of his due process right to a fair hearing because several unnamed members of the Board should have recused themselves because their superiors made prejudicial statements against Mr. Sauro. This Court will not address these allegations here because insufficient evidence was put forth at the hearing for this Court to find a reasonable likelihood of success on the merits on these claims. However, it is worth noting that altogether Mr. Sauro claims that at least five of the eleven Board members should have recused themselves from the December 18, 2013 vote.

on his claim that his due process rights were violated because the Board was prejudiced against him.

c

Procedural Due Process: Lack of Written Board Decision

Plaintiff additionally alleges that his procedural due process rights were violated because the Board failed to issue a written decision setting forth its findings of fact and conclusions of law when it suspended his pension at the December 18, 2013 meeting. Plaintiff alleges that the Board is required to put forth findings of fact and conclusions of law but failed to do so in an attempt to delay court review of the Board's decision by requiring a remand to the Board before a substantive review by the court.

A retirement board must meet "minimum procedural requirements" when issuing a decision. See Mosby v. Devine, 851 A.2d 1031, 1051 (R.I. 2004) (holding that the Attorney General must meet "minimum procedural requirements" when denying an application for a gun permit). The purposes of these procedural requirements are two-fold. First, the "applicant is entitled to know the evidence upon which the [board] based its decision and the rationale for" that decision. Id. Second, a Board must issue sufficient facts and conclusions to allow a "Court to review the board's decision to determine whether it is supported by competent evidence." Sobanski v. Providence Emps.' Ret. Bd., 981 A.2d 1021, 1022 (R.I. 2009) (mem.) (citing Pierce v. Providence Ret. Bd., 962 A.2d 1292, 1292-93 (R.I. 2009)).

Here, the Board's decision was issued to Plaintiff via a brief letter. (Ex. 47.) In that letter, the Board informs Mr. Sauro that a Board vote resulted in suspension of his pension. The letter expressly states that the decision was based on Mr. Sauro's failure to undergo the ordered medical examination. The letter additionally explains that the suspension will continue until

Plaintiff withdraws his refusal and submits to the exam. The Board's letter informs Plaintiff of (1) the evidence against him—he failed to attend the IME—and (2) the Board's rationale—the Board is suspending his pension under its authority in Providence City Code § 17-189(8) because he failed to appear for the IME. Under Providence City Code § 17-189(8), the Board is authorized to suspend a pension if the pensioner refuses to submit to an IME.

For the purposes of this Court's decision on whether to grant a preliminary injunction, this Court can consider the Board's decision based on the context of the letter because the facts and rationale of the Board are set forth sufficiently. This is not an appeal of the Board's decision. Such an appeal is only available via writ of certiorari to the Rhode Island Supreme Court.[35] See Scolardi v. City of Providence, 751 A.2d 754, 756 (R.I. 2000) (holding that "[i]n the absence of specific statutory delineation of a particular forum for relief, a party must resort to [the Supreme] Court by way of common law certiorari"). For these reasons and because there were sufficient facts and reasoning included in the Board's letter, Plaintiff does not have a reasonable likelihood of success on his claim that the lack of a full written decision violated his due process rights.

d

Substantive Due Process: 2011 Order for Functional Capacity Evaluation

The remaining due process claims are rooted in substantive due process. Substantive due process "guards against arbitrary and capricious government action . . . ." Moreau v. Flanders, 15 A.3d 565, 581 (R.I. 2011). If there is no fundamental right at issue, and Plaintiff here has not alleged that there is one, "a party seeking to establish a substantive violation of due process must

[35] The Court additionally notes that because Plaintiff is not seeking an administrative appeal, the Court may consider evidence outside the record rather than relying solely on the material presented in the Board decision. See G.L. 1956 § 42-35-15(f) (confining Court review to the record in an administrative appeal).

establish that the challenged provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Id. (internal quotations omitted) (quoting Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 10 (R.I. 2005)).

Substantive due process "does not protect all individuals from actions by the government that curtail liberty or injure property in violation of some law." Ginaitt v. Haronian, 806 F. Supp. 311, 316 (D.R.I. 1992) (citing PFZ Props., Inc. v. Rodriguez, 928 F.2d 28, 31 (1st Cir. 1991)). To rise to the level of a due process violation, there must be evidence that "governmental power is 'being used for purposes of oppression,' or where there is an 'abuse of government power that shocks the conscience,' or where government action is 'not sufficiently keyed to any legitimate state interests.'" Id. (quoting PFZ Props., Inc., 928 F.2d at 31-32) (finding a violation of substantive due process when a retired firefighter's pension was revoked, without a pre-deprivation hearing, based on the result of three IMEs, only two of which found that plaintiff was capable of return to his firefighter duties, when the ordinance at issue expressly required a unanimous finding).

The Plaintiff's first substantive due process allegation is that the Board exceeded its authority and acted arbitrarily and capriciously in ordering Plaintiff to submit to additional testing via a functional capacity evaluation after receiving the report of Dr. DeLuise. For the purposes of this Motion for a Preliminary Injunction, it is not necessary to detail the full arguments of the parties on this point. The ordered additional testing never occurred, and Plaintiff's failure to comply with this order for testing was not the reason for the suspension of his pension. The Board suspended Plaintiff's pension because he failed to appear for the 2013 IME, an order that was unrelated to the 2011 order. Therefore, Plaintiff suffers no continuing

harm related to the 2011 functional capacity evaluation order that would be addressed by a preliminary injunction.[36]

e

Substantive Due Process: 2013 Order for Independent Medical Evaluation

The Plaintiff's next contention of violation of substantive due process is that the Board again exceeded its authority in 2013 and acted arbitrarily and capriciously in ordering Plaintiff to attend another IME, which Plaintiff alleges was the third IME in two years. This allegation may be dismissed without considering whether the Board had the authority to order a third IME in two years because Plaintiff's allegation misconstrues the facts. First, there are statutory interpretation questions as to whether the additional testing ordered after the 2011 IME with Dr. DeLuise constituted an IME request. Second, Plaintiff never attended the follow-up testing, so a second City-ordered exam never occurred. However, as noted above, even if the Board did act arbitrarily and outside its authority in ordering the additional testing in 2011, this potential Board violation is unrelated to the issue of suspension of Plaintiff's pension because the Board suspended his pension for his failure to appear for the 2013 IME, not the 2011 functional capacity evaluation.

Even assuming without deciding that both 2011 orders were IME requests, the Board is still permitted to request that Plaintiff attend an IME in 2013. Both the original and amended ordinances specifically permit the City to send a pensioner for an IME once per year.

[36] However, the Court does note that, unlike the results of IME reports for other pensioners, (Tr. at 479-80, Vol. III, Oct. 6, 2014.), Mr. Sauro's 2011 IME report included recommendations by Dr. DeLuise that Mr. Sauro should undergo additional testing that Dr. DeLuise was unable to perform, including up to three functional capacity evaluations. See Ex. 12, at 3 ¶ 4. Based on Dr. DeLuise's recommendation and the Board's role to protect the pension fund as a matter of important public interest, the Court finds that Plaintiff does not have a reasonable likelihood of success on the merits on his claim that the Board's order was arbitrary and therefore a violation of substantive due process. See Nonnenmacher, 722 A.2d at 1203-04.

Providence City Code § 17-189(8) (2013); Providence Ordinance 1991, ch. 91-5 § 17-189(7). Therefore, even if Plaintiff was ordered improperly to attend two IMEs in 2011—which could entitle him to other relief, i.e. monetary damages or other forms of relief—the City was still authorized to request a new IME over twelve months later in 2013. Therefore, this Court does not find that Plaintiff has a reasonable likelihood of success on the merits of his claim that the order for the 2013 IME was a violation of his substantive due process rights.

f

Substantive Due Process: Mr. Sauro's "Refusal" to Submit to the 2013 Independent Medical Evaluation

The final claim that Plaintiff alleges in regard to substantive due process is that the Board's interpretation of "refusal" in regard to the pension ordinance is arbitrary and incorrect. Providence City Code § 17-189(8) states that the Board has the authority to suspend a pension if the pensioner should "refuse" to submit to an IME request. Plaintiff asserts that he did not "refuse" to attend the 2013 IME, but he failed to appear because he was ordered by his own physicians, "under threat of disengagement,"[37] that he should not travel out-of-state to the IME because such a journey could be life threatening. Plaintiff argues that "refusal" constitutes a willful, voluntary act, and therefore, following a doctor's orders does not constitute refusal. The Plaintiff argues that the Board acted arbitrarily and outside of its authority in suspending his pension because he did not refuse to submit to the IME, refusal being required for a suspension.

Although Plaintiff asserts that "refusal" requires a volitional act, that interpretation is not universally accepted. Plaintiff cites the 1990 edition of Black's Law Dictionary in defining "refusal" as "the result of a positive intention to disobey." However, the 2014 edition of Black's

[37] (First Am. Compl. ¶ 122(d); Pl.'s Prelim. Inj. Mem., at 20; Pl.'s Post-Hearing Mem., at 28; Pl.'s Post-Hearing Rebuttal Mem., at 5.)

Law Dictionary defines refusal as "[t]he denial or rejection of something offered or demanded." Black's Law Dictionary 1472 (10th ed. 2014). The more recent definition makes no overt requirement of a voluntary, willful act.[38]

Some courts have required a voluntary act to find a refusal. Griffin v. U.S., 618 A.2d 114, 120 (D.C. 1992) (citing Spradling v. Deimeke, 528 S.W.2d 759, 766 (Mo. 1975)) (holding that refusal is "a volitional act"). For courts requiring a voluntary act, inability to comply with a request does not constitute a refusal. Wessell v. State, Dep't of Justice, Motor Vehicle Div., 921 P.2d 264, 267-68 (Mont. 1996) (finding that allegedly drunk driver did not refuse a blood test under the implied consent law because he was unable to submit to the test as a result of a crippling fear of needles but did offer to submit to other forms of testing). However, other courts have found a refusal even though the party was incapable of complying with the request. Puritan Ins. Co. v. Superior Court, 171 Cal. App. 3d 877, 883-84 (Cal. App. Ct. 3d 1985) (holding that failure to comply with a discovery request for production of evidence constituted a refusal even though the party's expert had lost the item of evidence). Therefore, it is unclear whether refusal requires a volitional act or merely noncompliance.

Assuming without deciding that refusal does require a voluntary act, Plaintiff may be successful in asserting at trial that he did not refuse to attend the IME in October 2013. Plaintiff's testimony at the hearing was that he never refused to attend an IME but was ordered by his doctors to not attend:

[38] In fact, the textual example provided in conjunction with "refusal" further supports a definition that does not contain a willful component. That example states "the lawyer's refusal to answer questions was based on the attorney-client privilege." Black's Law Dictionary at 1472. A lawyer cannot voluntarily violate the attorney-client privilege, yet Black's Law Dictionary defines a failure to do so as a "refusal." See Rule 1.6 cmt. (2014) of the Rhode Island Rules of Professional Conduct. In this same vein, failure to act on an order because a doctor has prohibited that action could likewise be viewed as a refusal.

> "A. Yes, they advised me—actually, ordered me not to go . . .
>
> "Q. All right. And so did you personally refuse to go see Dr. McKeon in Waltham, Mass.?
>
> "A. No, I never refused.
>
> "Q. All right. You consulted your doctors and they told you not to go, it's life threatening; is that correct?
>
> "A. Yes, that's correct." (Tr. at 61, Vol. I, Oct. 1, 2014.)

If Plaintiff was ordered by his doctors not to attend the out-of-state IME, then a full trial could lead to a conclusion by a jury that his failure to appear for the October 2013 IME did not constitute a refusal. See Wessell, 921 P.2d at 267-68.

For the purposes of this proceeding, however, Plaintiff repeatedly argues in his memoranda submitted to this Court that he was required to comply with the orders of his doctors under threat of disengagement. However, none of the evidence presented to this Court indicates a potential of disengagement. During his testimony, Plaintiff never specifically used the term "disengagement" and did not bring up the matter, even when it would seem logical to do so.[39] In

[39] When questioned about his doctors, Mr. Sauro testified:

> "Q. Every time they asked you to appear at Waltham, Mass. in front of Dr. McKeon, right, had you been under any physician's care?
>
> "A. Yes.
>
> "Q. And had those physicians told you that such a trip would be life threatening?
>
> "A. Yes, they did.
>
> "Q. All right. And that's the reason why you didn't go, correct?
>
> "A. Yes, that's correct.

fact, a letter provided by Dr. Porto to Ms. Bailey in October 2013 is highly sympathetic of Plaintiff's situation, which leads this Court to question whether Dr. Porto would disengage Plaintiff even if he directly violated her orders. (Ex. 42.)[40] Because Plaintiff has failed to provide any evidence supporting the claim that his doctors threatened to disengage him if he attended the IME, this Court grants no weight to the claim of potential disengagement.

Even if Plaintiff's doctors did threaten disengagement, Plaintiff's claims of being bedridden, physically unable to leave the house, and ordered by his doctors not to attend the IME, are outweighed by the evidence and testimony presented to this Court. Mr. Sauro testified that he was not able to attend the October 2013 out-of-state IME both because he had been ordered not to attend by his doctors and because he was physically unable to travel that distance, being bedridden due to crippling anxiety and other medical conditions. (Tr. at 61, 64, Vol. I, Oct. 1, 2014.) Both of these bases for Plaintiff's inability to attend are undercut by evidence presented to this Court.

In regard to the claim that he was ordered by his doctors not to attend the IME, in addition to the above note that no evidence has been presented on the threat of disengagement,

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> "Q. What do you believe would have happened if you disobeyed your doctor's order?
>
> "A. To me or to - -
>
> "Q. If you acted contrary to the advice of your doctors, what do you think would have happened?
>
> "A. I would have probably died." (Tr. at 126, Vol. I, Oct. 2, 2014.)

This line of questioning would have been an excellent opportunity for Plaintiff to bring up the issue of disengagement, but he did not.

[40] In a letter to this Court, requested by Plaintiff, Dr. Porto again indicated sympathy for Plaintiff's condition. She appears to advocate for Plaintiff, referring to the City's actions as "bullying." (Ex. F.) This Court finds no evidence that Dr. Porto intended to disengage Plaintiff as a patient if he disobeyed her orders and traveled out-of-state for an IME (emphasis added).

Plaintiff himself admitted that his psychologist had advised him that driving was dangerous given the sedative medications that he was taking. (Tr. at 721, Vol. IV, Oct. 7, 2014.) Although Plaintiff does claim that Dr. Porto had given him permission to drive short distances when he felt capable of doing so, id., the letter from Dr. Porto presented to this Court indicates that "he really should not be driving a motor vehicle" because his "heavy medication regimen makes it dangerous to drive himself and for the safety of others." (Ex. 42.) Therefore, this Court concludes that Plaintiff cannot claim that he always follows his doctors' orders.

Mr. Sauro's claims of physical inability to travel due to being bedridden are outweighed by the videographic evidence presented to this Court showing Plaintiff and his wife traveling to various locations on both September 12 and September 13, 2013, the day before and day of Plaintiff's scheduled IME. (Ex. 61.) Although Plaintiff testified that they left the house on September 12, 2013 in order to obtain the doctor's note requested by Ms. Bailey, (Tr. at 63-65, Vol. I, Oct. 1, 2014), such an explanation does not counter the fact that Plaintiff was capable of leaving the house to perform necessary tasks, including a doctor's appointment to verify his medical status at the City's request.

Finally, testimony by both Plaintiff himself as well as his wife prevents this Court from finding that Mr. Sauro has a reasonable likelihood of success on his claim that he did not refuse to attend the IME. During cross-examination, both Mr. and Ms. Sauro were asked whether Mr. Sauro would have attended an IME in September or October 2013 if the IME had been scheduled in Cranston, the couple's city of residence. Ms. Sauro testified, "I don't think he would have been able to do it, no." (Tr. at 628, Vol. IV, Oct. 7, 2014.) Mr. Sauro himself testified, "If I went to a doctor in Rhode Island [for an IME in September/October 2013], I probably wouldn't be standing here today. I'd be dead." Id. at 724. He testified that he would not go to any further

IMEs, regardless of location. Id. at 725.[41] Plaintiff testified that he could attend appointments with his own doctors because "[t]hey are to help me," but any physical exams ordered by the City are "post traumatic stress disorder triggers" and he could not attend. Id. at 724.

Additionally, Mr. Sauro was insistent that the City could not send him for another IME unless it sent every disability pensioner, based on his interpretation of the pension ordinance. Id.[42] During redirect examination, in a none-too-subtle attempt to lead Mr. Sauro, Plaintiff's counsel questioned him on the circumstances under which he would attend an IME:

> "Q. So is it fair to say that if your doctors, Dr. Porto and Dr. Denby, told you or communicated to you that you could travel to Dr. McKeon for that IME, you would have done so; am I correct?
>
> "A. Yes.
>
> "Q. And if they—if they were to tell you, and, I mean, your doctors, again, Porto and Denby, that you could attend an IME in Cranston, Rhode Island, you would go, wouldn't you?
>
> "A. Yes, I would." Id. at 726-27.

However, Plaintiff later qualified these statements based on his concern that he has been selectively prosecuted, as a result requiring two questions by his own counsel regarding Plaintiff's willingness to attend another IME:

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[41] Opposing counsel pointed out on cross-examination that the note from Dr. Denby stating that Mr. Sauro could not attend the September 2013 IME specifically stated that Mr. Sauro could not attend because he could not travel out of state, and Plaintiff agreed. (Tr. at 730, Vol. IV, Oct. 7, 2014.)

[42] Although not directly relevant to the issue of whether Mr. Sauro refused to attend the IME, the Court notes that the ordinance cannot be interpreted to require that all pensioners be sent for IMEs. A basic canon of statutory construction is that a statute cannot be interpreted to reach an absurd result. Trembley v. City of Central Falls, 480 A.2d 1359, 1363 (R.I. 1984) (citing Town of Scituate v. O'Rourke, 103 R.I. 499, 512-13, 239 A.2d 176, 184 (1968)). Unquestionably, the City could not afford the expense of sending all of its pensioners to an IME every time it felt the need to send one. However, IMEs are important to ensure the integrity of the pension system. See Nonnenmacher, 722 A.2d at 1204 (approving pension restrictions because they were "designed to protect the solvency of the city's pension system"). Therefore, Plaintiff's argument fails.

> "Q. Now, isn't it true that you, yourself, would have the desire and the willingness to attend an IME scheduled by the City of Providence only if your doctors, meaning, Porto and Denby so advised you to?
>
> "A. That I would and, also, I believe that being singled out in that the ordinance states that they have to require, if they choose to send one, then they are required to send all. So I believe that if I was to do that, then they would have to send out another 900, 1,000 notices to other people on disability in the City, and they would also have to attend an IME.
>
> "Q. Forgetting about the fairness of the issue. Forget about the fairness.
>
> "A. Okay.
>
> "Q. If a notice came in the mail prior to your suspension of pension from the City of Providence—if a notice came in the mail prior to the suspension of your pension from the City of Providence scheduling an IME, anywhere, you would attend that appointment if Dr. Porto and Dr. Denby advised you to?
>
> "A. Yes, because that would mean that I was healthy and able to attend it." Id. at 740-41.

The crux of Plaintiff's testimony is that he would only attend an IME if (1) his doctors informed him that he could attend and (2) the City proceeded to send every disability pensioner for an IME as well. Id. at 740-41.[43] Notwithstanding the City's right to order an IME, on cross-examination it became clear to the Court that Plaintiff has no intention of submitting to any IME.

In light of the evidence before this Court, particularly Plaintiff's own testimony that he would not attend an IME even if it were scheduled within Rhode Island, this Court reaches the conclusion that Plaintiff refused to attend the IME in October 2013. Therefore, based on the

[43] Carrying Mr. Sauro's reasoning to its logical conclusion, the City will never again be able to send Mr. Sauro for an IME to verify his disability status. Not only would Mr. Sauro's doctors have to clear him for an IME, which itself defeats the purpose of having an independent medical evaluation, but the City would also have to send every other disability pensioner. Therefore, under Mr. Sauro's interpretation of the ordinance, the City must continue to pay his pension without any avenue to verify his continuing disability.

current evidence, this Court cannot find that Plaintiff has a reasonable likelihood of success on the merits of his claims that he did not refuse to attend the IME and the Board had no authority to suspend his pension on such grounds.

2

Equal Protection

Count III of Plaintiff's First Amended Complaint alleges a violation of the Fourteenth Amendment to the United States Constitution, specifically, the Equal Protection Clause. The basis for Plaintiff's allegation of an Equal Protection violation is selective enforcement of the pension ordinance against Plaintiff. The Plaintiff asserts that he has been the only disability pensioner that Defendants have investigated for pension abuse, even though other pensioners have been the subject of similar media stories. In addition to allegedly being the only target of the City's investigation, Plaintiff asserts that the pension ordinance change in 2013 to remove the geographical limitation on IMEs was effectuated in order to allow Defendants to target Plaintiff.

The federal Equal Protection Clause essentially requires that states treat similarly situated persons alike. Wal-mart Stores, Inc. v. Rodriguez, 238 F. Supp. 2d 395, 416 (D.P.R. 2002) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)). Absent an allegation of racial, religious, or speech discrimination, a party claiming an Equal Protection violation must present evidence that the defendant "'acted with malicious or bad faith intent to injure'" the plaintiff.[44] Wal-mart Stores, Inc., 238 F. Supp. 2d at 417 (quoting Yerardi's Moody

[44] Courts "have recognized the onerous nature of this claim." Wal-mart Stores, Inc., 238 F. Supp. 2d at 417 (citations omitted). In Wal-mart Stores, Inc., the Court did find a violation because the actions by the Puerto Rico Secretary of Justice against the plaintiffs not only varied from her actions in regard to those similarly situated but were also designed to punish plaintiffs for their "failure to submit to her [prior] requests." 238 F. Supp. 2d at 417. Here, the pension ordinance allowing annual IMEs balances the retirees' interests, the City's fiscal interests, and

St. Rest. & Lounge, Inc. v. Bd. of Selectmen of the Town of Randolph, 932 F.2d 89, 92 (1st Cir. 1991)). Unequal application of a law by a state is not an Equal Protection violation "'unless there is shown to be present in [the unequal application] an element of intentional or purposeful discrimination.'" State v. Partington, 847 A.2d 272, 280 (R.I. 2004) (quoting Snowden v. Hughes, 321 U.S. 1, 8 (1944)).

Selective or vindictive enforcement has been recognized as a violation of the Equal Protection Clause that does not rely on racial, religious, or speech discrimination by both the Rhode Island and United States Supreme Courts. See Partington, 847 A.2d at 279; Wal-mart Stores, Inc., 238 F. Supp. 2d at 416 (citing Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)). However, mere evidence of enforcement against one person and not a similarly situated person is insufficient; instead, the plaintiff "must show that the decision to treat him or her differently from others is wholly arbitrary or irrational." Partington, 847 A.2d at 279 (quoting Wojcik v. Massachusetts State Lottery Comm'n, 300 F.3d 92, 104 (1st Cir. 2002)) (internal quotations omitted).

In the present matter, Mr. Sauro was requested by Defendants to recertify his disability and submit to IMEs on multiple occasions, and he alleges that other pensioners were not similarly subjected to such review. However, based on the testimony heard by this Court, Plaintiff's allegation is insufficient to rise to the level of selective enforcement violating the Equal Protection Clause. First, the Court finds credible Ms. Bailey's testimony that Mr. Sauro was not the first pensioner that the City sent for an IME. Ms. Bailey testified that, prior to sending Mr. Sauro for an IME in 2011, she had previously sent pensioners John McGlaughlin

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the taxpayers' interests in the use of their tax dollars. See Leddy, 843 A.2d at 488; Nonnenmacher, 722 A.2d at 1203-04.

and Fred Miller for IMEs.[45] Therefore, in regard to requests for IMEs, this Court finds that Plaintiff's selective enforcement claim fails because Mr. Sauro was not treated differently from similarly situated disability pensioners.

Second, even if this Court were to accept that Plaintiff received more IME requests than other pensioners, Ms. Bailey indicated that the IME reports of the other pensioners did not include recommendations for additional testing, as Dr. DeLuise's report on Plaintiff included. (Tr. at 479-80, Vol. III, Oct. 6, 2014.) The additional requests fall short of selective prosecution because the City acted reasonably in ordering multiple evaluations given the media attention and Dr. DeLuise's recommendations. See Perrotti v. Solomon, 657 A.2d 1045, 1048-49 (R.I. 1995) (holding that the state retirement board had an obligation to revisit a pensioner's pension after learning of a conviction of mail fraud related to his state employment); U.S. v. Rice, 659 F.2d 524, 527 (5th Cir. 1981) (rejecting a selective enforcement claim by a "tax protester" convicted of willful failure to file taxes because "the government lacks the means to investigate every suspected violation of the tax laws, [therefore] it makes good sense to prosecute those who will receive, or are likely to receive, the attention of the media").

Our Supreme Court has recognized that matters of potential pension abuse are matters of significant public concern. Leddy, 843 A.2d at 488; Nonnenmacher, 722 A.2d at 1203-04. As Mr. Igliozzi testified, Board members have "a fiduciary responsibility" to the taxpayers, and the "Board is under a lot of scrutiny because pension issues [are] such a hot topic publicly." (Tr. at 217-18, Vol. I, Oct. 2, 2014.) Even the decision to send Mr. Sauro to an out-of-state physician for an IME was reasonable and not arbitrary because, as Ms. Bailey testified, it can be difficult to obtain an IME physician because they must be unbiased, never have examined the pensioner

[45] Ms. Bailey additionally testified that her predecessor had sent pensioners for IMEs in the past as well.

before, hold a relevant specialty, and be willing and available to perform the IME. (Tr. at 432, 439-40, Vol. III, October 6, 2014.)

It is the opinion of this Court that Defendants adhered to their fiduciary duties to the City taxpayers and future retirees in requesting that Mr. Sauro undergo an IME in 2011 and again in 2013, particularly in light of heightened public awareness of Mr. Sauro's situation. Although government actors cannot selectively utilize legislation in order to retaliate against a party, those actors may enforce legislation in a reasonable manner against some parties but not others as long as the choice of enforcement is not arbitrary or spiteful. See Rice, 659 F.2d at 527; contra Wal-mart Stores, Inc., 238 F. Supp. 2d at 416, 418 (finding that the plaintiff had a reasonable likelihood of success on its selective prosecution claim because the defendant's actions were clearly in retaliation for plaintiff's refusal to submit to defendant's prior unlawful requests). This Court views Defendants' actions of investigating Plaintiff as reasonable given their fiduciary duties to the taxpayers and concludes that Plaintiff's likelihood of success on his Equal Protection Clause claim is relatively low.

3

First Amendment

Count I of the First Amended Complaint alleges a violation of Plaintiff's First Amendment rights. Although Plaintiff claims a violation of his rights to freedom of speech and freedom to petition for redress of grievances, the evidence presented to this Court does not support a finding of a violation of freedom of speech because Mr. Sauro was never denied an opportunity for expression. Plaintiff alleges that the 2013 ordinance change that removed the geographical restriction on IMEs was a direct result of his own objection to the out-of-state IME ordered in July 2013. Plaintiff objected to the Waltham, MA IME on the grounds that it was

inconsistent with the ordinance at the time, which required IMEs to be scheduled at the pensioner's place of residence or mutually agreed upon location. Although Plaintiff's objection was successful in July 2013, he alleges that the ordinance was changed in retaliation for his successful prior objection, thereby violating his First Amendment right to petition for redress of grievances.

The First Amendment to the United States Constitution provides, inter alia, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." A government body cannot retaliate against an employee for exercising his First Amendment rights. Vierra v. R.I. Mun. Police Acad., 539 A.2d 971, 975 (R.I. 1988) (affirming an injunction prohibiting the police academy from withholding plaintiff's certificate of graduation because the hearing justice found that the academy's motivation for the denial was retaliation against plaintiff for previously filing successful litigation against the academy).

The primary inquiry in evaluating an alleged First Amendment violation on the basis of retaliation is to determine whether the defendant's action was substantially motivated by some constitutionally protected conduct by the plaintiff. Id. (citing Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). The plaintiff bears the burden of proof for this initial showing. Id. However, our Supreme Court has recognized that "seldom will an employer admit that an employee's constitutionally protected conduct was the substantial or motivating factor upon which the employer's decision to discharge the employee was based." Id. (citing Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)). Therefore, circumstantial evidence may be utilized to meet the plaintiff's burden. Id. (citing Fishman v. Clancy, 763 F.2d 485 (1st Cir. 1985)). If the plaintiff demonstrates that the action was substantially motivated by the plaintiff's

conduct, then the burden shifts to the defendant to "show by a preponderance of the evidence that it would have reached the same decision" absent the plaintiff's constitutionally protected conduct. Id.

In the present case, the alleged retaliatory conduct was the City's amendment of the pension ordinance to remove the geographical limitation on IMEs. Plaintiff claims that this change was made specifically to allow Defendants to send Mr. Sauro to Waltham, MA for an IME, which he additionally claims was done in retaliation against him for objecting[46] to the out-of-state location for the July 2013 IME. During the hearing, Mr. Sauro did not point to sufficient facts and circumstances to permit this Court to conclude that the ordinance was amended in retaliation against Mr. Sauro. At the hearing, Mr. Sauro testified as to why he believed the amendment was targeted at him:

> "Q: How did Mr. Igliozzi go to great lengths to change the ordinance specifically targeting you?
>
> "A: Yeah, okay, he, I believe the City had a secret council meeting, and they went and they hid the agenda of changing that ordinance so there was no public hearing on it, and then they voted to approve it, I assume, and then they went and took a second vote on it because I actually have the video of Councilman Igliozzi doing that and the other council members not knowing what he was talking about when he did that and then Council President Solomon covered the, covered the microphone with his hand when Councilman Igliozzi approached him because I don't believe it was ever in the Ways & Means Committee, and he was discussing to them what was taking place and other council members brought to their attention, 'We don't have any idea what you're doing or what is going on here. I never heard of this,' and then so he covered the microphone, and Councilman Igliozzi was whispering to him what they had done." (Tr. at 91-92, Vol. I, Oct. 1, 2014.)

[46] This Court assumes without deciding that Mr. Sauro's objection in July 2013 constitutes a protected petition of the government for redress of grievances.

At the hearing, Mr. Igliozzi denied recollection of ever discussing an ordinance change that would specifically allow for out-of-state IMEs, although he did confirm that—in his opinion—the new ordinance would allow an IME to be scheduled out of state. (Tr. at 208-09, Vol. I, Oct. 2, 2014.) Additionally, Mr. Igliozzi testified that "the council, you know, as we meet, council members, we go back and forth, we go up and talk to the City Solicitor, we'll talk to the Presiding Officer, also the Majority Leader. It's the confluence of a legislative body." Id. at 205-06. The Plaintiff presented no other adverse witnesses with personal knowledge of the amendment, which limits this Court's ability to infer retaliation from the circumstantial evidence presented by Plaintiff: namely, that the ordinance was changed less than a month after Plaintiff's objection to the out-of-state IME.

This Court does not find that this circumstantial evidence is sufficient to lead to a likelihood of success on the merits of Plaintiff's claim. The city council has the authority to amend the pension ordinance as it sees fit. See G.L. 1956 § 45-5-1;[47] Providence Home Rule Charter, art. IV, § 401(a).[48] [49] Councilman Igliozzi, as the council finance chair and a self-professed advocate of pension reform, would logically be involved in any pension ordinance amendments. Additionally, the city council may have been motivated by Plaintiff's objection without a retaliatory motive. Plaintiff's situation may have made the city council aware of a

[47] Section 45-5-1 provides, in full: "The town council of each town has full power to manage the affairs and interests of the town, and to determine all matters and things as by law come within its jurisdiction."

[48] Section 401(a) vests the city council with the authority "[t]o enact such ordinances as the city council may consider necessary to insure the welfare and good order of the city and to provide penalties for the violation thereof[.]"

[49] Although our Supreme Court held in Arena v. City of Providence that the City could not apply a change to the pension ordinance retroactively against pensioners who had retired prior to the ordinance amendment, that decision was based on the language of the specific ordinance provision at issue. 919 A.2d 379, 393 (R.I. 2007). No such language exists in Providence City Code § 7-189.

problem with the ordinance: when a pensioner requires multiple IMEs, finding new, willing doctors within Rhode Island may become difficult. The ordinance amendment may have been an effort to alleviate such a problem. This Court finds that Mr. Sauro's testimony, while fervent, was mere conjecture and insufficient to create an inference of retaliation. Contra Vierra, 539 A.2d at 975 (relying on the trial justice's conclusions based on her observations at a hearing to conclude that the defendant's actions were motivated by plaintiff's prior lawsuit). Without finding an inference of retaliation based on the testimony presented, this Court cannot conclude that Plaintiff has a reasonable likelihood of success on the merits of his First Amendment claim.

4

Breach of Contract and Contract Clause

Plaintiff additionally states two counts rooted in contract issues. Count VI alleges breach of contract because "John Sauro entered into a binding agreement with Defendants, and the agreement was supported by valuable consideration . . . [which] Defendants intentionally breached . . . ." (First Am. Compl. ¶¶ 184, 185.) Plaintiff does not specify to what this contract claim refers. Count IV alleges a breach of the contract clause, arguing that Defendants violated the contract clause by retroactively altering his pension benefits. (First Am. Compl. ¶ 178.) The essence of Plaintiff's contract claims seems to be that his right to his pension vested at the time of his retirement and Defendants are barred from applying any ordinance changes retroactively to deprive Plaintiff of his pension (emphasis added).

The Contract Clause of the Rhode Island Constitution prohibits retroactive application of laws that impair obligations of existing contracts.[50] A Court must apply a three-part analysis in evaluating an alleged breach of the contract clause:

> "A court first must determine whether a contract exists. . . . If a contract exists, the court then must determine whether the modification results in an impairment of the contract and, if so, whether this impairment can be characterized as substantial. . . . Finally, if it is determined that the impairment is substantial, the court then must inquire whether the impairment, nonetheless, is reasonable and necessary to fulfill an important public purpose." Nonnenmacher, 722 A.2d at 1202.

Therefore, this Court must first consider whether Mr. Sauro's pension constituted an enforceable contract.

The Plaintiff's argument misconstrues the nature of his pension as well as the ordinance relating to IMEs. Although our Supreme Court has recognized that pension benefits may vest upon retirement, such vesting is dependent upon the wording of the specific governing ordinance. Arena, 919 A.2d at 393-94 (R.I. 2007) (finding that plaintiffs' interest in their cost of living allowance benefits had vested upon retirement because the ordinance in effect specifically stated that the retirement allowance was to be determined based on the ordinance in effect upon the date of retirement). Additionally, the Supreme Court noted that even if a pension benefit vests upon retirement, that benefit may be subject to divestment. Perrotti, 657 A.2d at 1049 (affirming that a retirement board may revisit a pensioner's pension after learning of misconduct committed by the pensioner during employment).

The ordinance that Mr. Sauro retired under did not include language specifying that his pension benefits were to be determined based on the ordinance in effect upon his retirement

[50] The Rhode Island Constitution, article I, section 12 provides, in full: "Ex post facto laws—Laws impairing obligation of contract—No ex post facto law, or law impairing the obligation of contracts, shall be passed."

(emphasis added). Additionally, the ordinance in effect upon Mr. Sauro's retirement included a provision permitting suspension and eventual revocation of the pension upon refusal to submit to an IME. Providence Ordinance 1991, ch. 91-5 § 17-189(7). Therefore, even if Mr. Sauro did have a vested interest in his pension upon his retirement, it was always subject to divestment if he refused to submit to an IME. See Nonnenmacher, 722 A.2d at 1203 (holding that plaintiffs' pension benefits vested upon retirement, but allowing application of an ordinance that reduced the pension amount because plaintiffs earned supplemental income from outside employment).

Additionally, the 2013 amendment did not change the fact that Plaintiff's pension could be suspended for refusal to attend an IME; it merely permitted the City to select a physician outside Rhode Island to perform the IME. This Court finds this is not a substantial interference with any vested pension interest. See Nonnenmacher, 722 A.2d at 1203 (holding, in dicta, that a pension ordinance change setting a fifty percent minimum pension rather than the previous varying pension amounts from fifty to seventy-five percent did not constitute a substantial interference because the minimum amount remained unchanged). However, even if it were a substantial interference, ensuring that the City has access to a sufficient pool of physicians to examine pensioners to protect the integrity of the pension system constitutes an important public purpose, itself sufficient to nullify a claim for violation of the Contract Clause. Nonnenmacher, 722 A.2d at 1203-04 (holding that an ordinance change "designed to protect the solvency of the city's pension system" constituted "a reasonable means of fulfilling an important public interest"). The Plaintiff's Contract and Contract Clause claims have no merit that this Court can perceive at this time, and therefore, the Court is not persuaded as to the likelihood of success on these claims.

5

The Annuity

In his post-hearing brief, Plaintiff asserts a claim to his annuity for the first time. In his First Amended Complaint and initial memorandum to this Court, Plaintiff made a vague reference to a claim under the takings clause (Count V). During the hearing, only one reference was made to Plaintiff's annuity, consisting of only three questions.[51] In his brief, Plaintiff alleges that, even if he had refused to attend an IME, the City was only authorized to suspend his pension. He argues that the annuity is a separate entity that the City had no authority to suspend. Therefore, Mr. Sauro asserts that the City's failure to continue annuity payments after suspending his pension amounts to a violation of the takings clause because it is a denial of property without due process of law. See R.I. Const. Amend. V.

[51] The Plaintiff was asked:

> "Q: Did you receive any annuities from the City of Providence?
>
> "A: Yes.
>
> "Q: Explain that to the Court. What was that?
>
> "A: That is when you pay in, I believe you pay in 9-and-a-half percent a week into our pension, and when you retire, at that time you can either take your money out and keep your money for yourself or you can leave it in the pension system for the City to invest, and they pay you an interest percentage on it until it—it is called an annuity, and they include that along with your pension check every money [sic].
>
> "Q: And then you got 66 and two-thirds percent of that money; is that correct?
>
> "A: I got the—yes, 66 and two-thirds. Yes" (Tr. at 2-3, Vol. I, Oct. 1, 2014.)

The Court notes that the City pension ordinance provides for annuity payments[52] to pensioners on accidental disability retirement. Providence City Code § 17-189(7). The retirement allowance specifically includes "(a) [a]n annuity which shall be the actuarial equivalent of his/her accumulated contributions at the time of his/her retirement, and (b) [a] pension, in addition to the annuity, of sixty-six and two-thirds (66 2/3) percentum of his/her final compensation . . ." Id. §§ 17-189(7)(a), (b) (emphasis added). This specific designation of allowance to annuity and pension indicates, based upon the sparse evidence, that the annuity is an entity separate and apart from the pension. Additionally, the ordinance requires that, when the annuity contributions are added to the retirement system, they be "credited to a separate subaccount within the employees' account," which supports the notion that the annuities are separate from the pension. Id. § 17-185(1). Finally, the provision under which Mr. Sauro's pension was suspended indicates that if a pensioner refuses to submit to an IME, "his or her pension shall be discontinued . . ." Id. § 17-189(8)(a) (emphasis added).

A cursory reading of these ordinance provisions leads this Court towards agreement with Plaintiff that his property interest in his annuity payments may have been improperly withheld. However, outstanding questions remain on this matter, such as the value of Plaintiff's annuity,

[52] The ordinance defines "annuity" as:

> "payments for life derived from the accumulated contributions of a member. All annuities shall be paid in equal monthly installments. Notwithstanding the foregoing, for the purposes of paragraphs (b) and (c) of subsections (2) and (4) of section 17-189 of this article, 'annuity' shall mean the payments for life provided by the member's accumulated contributions attributable to his/her required regular deductions, including special contributions or deductions under the provisions of section 17-188 of this article and including the amount by which his/her required regular deductions would have increased had he/she elected to increase his/her deductions as provided in subsection (1) of section 17-185 of this article, if he/she did not do so." Sec. 17-181.3.

how it is calculated, and whether it is normally delivered to Plaintiff in combination with his pension. The record is insufficient at this time to allow the Court to make the inferences necessary to resolve this issue. Plaintiff failed to present this argument to the Court until after the completion of the hearing, and the City was not provided an opportunity to introduce evidence or examine witnesses to negate this allegation. Therefore, the Court cannot reach a determination at this time, notwithstanding the Court's inclination. The Board is free to restore the annuity payments, or either party may request further hearing on this specific issue.

6

Other Causes of Action

Plaintiff puts forth several additional causes of actions: promissory estoppel (Count VII), tortious interference with a contract (Count VIII), breach of covenant of good faith and fair dealing (Count IX), intentional infliction of emotional distress (Count X), and loss of consortium (Count XI). The Plaintiff makes only broad assertions on all of these claims and provides no factual or legal support in either the First Amended Complaint or in Plaintiff's Memoranda and Briefs to this Court. Additionally, Plaintiff did not discuss any of these claims at the hearing. This Court is therefore left to speculation on all of these claims. Our Supreme Court has stated that "summarily listing issues for appellate review, 'without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue.'" Town of Coventry v. Baird Props., LLC, 13 A.3d 614, 619 (R.I. 2011) (quoting Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1131 n.1 (R.I. 2002)). Given this recognized rejection of unsupported arguments, this Court cannot find a likelihood of success on any of these claims.

7

Conclusion on Likelihood of Success on the Merits

Although, as noted above, some of Plaintiff's claims may be found to have merit after a full trial, many of those claims relate to past alleged harms, for which Mr. Sauro is seeking monetary damages. In regard to the Motion for Preliminary Injunction before this Court, the only issue is whether Mr. Sauro's pension should be restored. Claims relating to actions by Defendants prior to 2013, such as the alleged due process violations relating to the 2011 functional capacity evaluation order, did not lead to the suspension of Mr. Sauro's pension. Therefore, the likelihood of success on those claims holds little weight in regard to the present Motion.

The crux of the likelihood of success question before this Court is whether the Board acted within its power in suspending Mr. Sauro's pension, which itself turns on whether Mr. Sauro refused to attend the IME ordered by Defendants in October 2013 and whether the Board denied Mr. Sauro a fair hearing in December 2013. As noted above, this Court's conclusion is that Plaintiff does not have a high likelihood of success on his claim that he did not refuse. Additionally, this Court finds that the Board members were not prejudiced against Mr. Sauro and rendered a sufficient decision to him to meet procedural due process requirements. Therefore, this Court concludes that, while some of Plaintiff's claims may succeed at trial, overall—and particularly in reference to those claims relevant to the ultimate suspension of Plaintiff's pension—Plaintiff has not established a reasonable likelihood of success on the merits at this juncture.

B

Irreparable Harm

This Court must next consider whether Plaintiff will suffer irreparable harm if the preliminary injunction is not granted. Iggy's Doughboys, Inc., 729 A.2d at 705. To justify a preliminary injunction, irreparable harm must be "presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position." Fund for Cmty. Progress, 695 A.2d at 521.

The Plaintiff alleges irreparable harm exclusively from the denial of his constitutional rights, which Plaintiff argues amounts to per se irreparable harm. Courts have recognized that "the deprivation of constitutionally-protected rights for even minimal amounts of time constitutes not only injury, but irreparable injury." Providence Firefighters Local 799 v. City of Providence, 26 F. Supp. 2d 350, 354 (D.R.I. 1998).

However, in cases where a deprivation of constitutional rights was found to amount to irreparable harm, the deprivation was ongoing. See, e.g., Elrod v. Burns, 427 U.S. 347, 373 (1976) (finding irreparable harm from a First Amendment violation by a sheriff's department policy to replace existing employees who do not allege support for an incoming political party after a change in political control); Giovani Carandola Ltd. v. Bason, 303 F.3d 507, 511 (4th Cir. 2002) (finding irreparable harm from a First Amendment violation in the prohibition of a nude dancing facility); Providence Firefighters Local 799, 26 F. Supp. 2d at 354 (finding irreparable harm from First Amendment violation when Fire Chief issued an order requiring any firefighter desiring to speak publicly on a department matter to first obtain approval from the Chief). By

contrast, here, Plaintiff claims a violation of his due process rights.[53] Although this Court recognizes that some of his due process claims may have merit, those claims relate largely to the actions of Defendants in 2011 and the order for additional testing. These actions did not lead to the suspension of Plaintiff's pension, and therefore, restoration of that pension would not remedy these alleged constitutional violations.

At the hearing, Plaintiff also detailed physical and mental harms that he is suffering, which he attributed to Defendants' actions in regard to his pension. (Tr. at 710, Vol. IV, Oct. 7, 2014.) Although Plaintiff claims that these injuries are the result of Defendants' actions, this Court finds a significant question of fact as to the causation of these injuries.[54] First, Mr. Sauro testified that he has had psychological problems in the past, going back to his childhood. (Tr. at 133, Vol. I, Oct. 2, 2014; Tr. at 709, Vol. IV, Oct. 7, 2014.) In regard to the physical ailments not related to his on-the-job right shoulder injury, Plaintiff testified that he believes that these ailments are related to the Defendants' actions "[b]ecause of all of the stress that's been brought into my life, what happens is your body, the rest of your body breaks down so these are all symptoms that I'm having from everything that's going on that's happening to me." (Tr. at 710, Vol. IV, Oct. 7, 2014.)

Although Plaintiff submitted extensive medical documentation relating to his past and current medical conditions, those documents provide this Court with insufficient evidence to conclude that those harms are caused by the actions of Defendants. (Exs. E-Q.) Mr. Sauro himself testified that the cause of many of these ailments is "stress," and it is just as likely that

[53] As this Court already noted, Plaintiff does not have a reasonable likelihood of success on his First Amendment claim.

[54] In his post-hearing brief, Plaintiff notes that the medical reports from his doctors indicate that his "health spiraled downward after the new [sic] story first aired in 2011."

the stress is a result of the media attention and the severe public backlash[55] from the media reports. Given the extent of the public response, this Court cannot determine based on the evidence before it whether the stress causing the physical ailments was related to this public reaction, Defendants' actions, or both.

It is an understatement to say that this Court frowns upon the actions allegedly taken by others against the Plaintiff as testified to herein. Criminal acts and other forms of thuggery have no place in any response to media reports about Plaintiff's activity. The Court can reasonably infer that such actions were brought about by certain media attention centered on the Plaintiff's activity in lifting weights during the time he was receiving a disability pension from the City. However, the media and the others who have allegedly taken such actions are not parties to this case. Furthermore, as discussed above, there is a legitimate public interest in such media attention as it relates to Plaintiff, his pension, and the entire pension system. See Leddy, 843 A.2d at 488. Therefore, when the Court considers Plaintiff's physical ailments, the Court gives significant weight to the inference that such ailments are caused in large part by those who are not parties to this case.

Although this Court has rejected the constitutional and medical harms as qualifying irreparable harms, the Court does recognize that Plaintiff will suffer monetary harm[56] as a result of Defendants' actions if this Court does not grant the preliminary injunction. Our Supreme Court has recognized that loss of income "may cause disruptions in [an employee's] everyday

[55] Mr. Sauro testified that, after the news stories began, members of the public would show up at his house, throw trash on his front lawn, damage the property, follow him and his wife, directly confront him in attempts to start physical fights, and even send death threats in the mail and via the computer. (Tr. at 31, Vol. I, Oct. 1, 2014.)

[56] Again, this Court observes that Plaintiff allowed eight months to pass between suspension of his pension and filing of the Complaint in this matter. Although this delay does not eliminate the possibility of monetary harm, it does lead this Court to question the extent of Plaintiff's financial difficulties.

economic affairs." In re State Emps.' Unions, 587 A.2d 919, 926 (R.I. 1991) (app. A). However, the Court recognized that "a complaint relating to lost income is, in its essence, a claim for money damages." Id. (app. A). In order to constitute irreparable harm, an injury must have no adequate remedy at law. Iggy's Doughboys Inc., 729 A.2d at 705. However, monetary harm does have an adequate remedy at law—monetary damages. In re State Emps.' Unions, 587 A.2d at 926 (app. A). Therefore, Plaintiff is not left with the risk of "an empty victory" if he prevails in his underlying case as he can be adequately compensated with monetary damages for his prior lost wages. Id. at 926 (app. A).

Based on the above considerations, this Court concludes that Plaintiff has not alleged sufficient facts to lead this Court to conclude that Plaintiff would suffer irreparable harm without a preliminary injunction because his only harm is monetary, which can be adequately remedied with monetary damages upon adjudication of the merits of his claim.

C

Balancing of the Equities

The next consideration that this Court must make in evaluating Plaintiff's Motion for Preliminary Injunction is whether the balance of equities tips in Plaintiff's favor. Iggy's Doughboys, Inc., 729 A.2d at 705. In balancing the equities, a court must consider harms to the plaintiff if the preliminary injunction is denied, harms to the defendant if the preliminary injunction is granted, and the importance of the public interest. See id.

If this Court denies the Motion for Preliminary Injunction, Plaintiff will remain without his pension payments while his case proceeds on the merits. Although the lack of pension payments will harm Plaintiff in that he and his wife will have only her pension payments to cover their bills, as already explained, such monetary harm does not constitute irreparable harm.

See In re State Emps.' Unions, 587 A.2d at 926 (app. A). Additionally, Plaintiff's medical coverage is still active, and Ms. Sauro's pension provides the couple with a few thousand dollars each month to cover their bills. (Tr. at 4, 72, Vol. I, Oct. 1, 2014.)

By contrast, if the preliminary injunction is granted, the City will have to resume payments on Plaintiff's pension, again exclusively monetary harm which has an adequate remedy at law. See In re State Emps.' Unions, 587 A.2d at 926 (app. A). However, it is important to consider that the monetary harm the City would suffer is a loss of taxpayer money, specifically from the pension fund. This taxpayer and City employee nexus implicates a public interest concern. See Nonnenmacher, 722 A.2d at 1203-04.

The Court must consider the public interest when it balances the equities of a motion for preliminary injunction. Iggy's Doughboys Inc., 729 A.2d at 705. Our Supreme Court has recognized that pension matters are matters of great public importance. Nonnenmacher, 722 A.2d at 1203, 1204 (holding that an ordinance limiting pension amounts was a "reasonable means of fulfilling an important public interest" and "designed to protect the solvency of the city's pension system") (emphasis added); see also Leddy, 843 A.2d at 488 (characterizing a question of pension system manipulation as a "legitimate public interest"). Pensions are paid with taxpayer money, and the City has a responsibility to protect taxpayer funds and investigate potential fraud, or even innocent/unintentional misuse of the pension system. In addition to protecting taxpayer funds, the City also has a responsibility to keep the pension fund solvent to ensure that funds are available for future pensioners. As discussed earlier, Plaintiff's right to his pension at this point in time is not clear insofar as the Court is not satisfied that Plaintiff has demonstrated a reasonable likelihood of success on the merits as to the claims he has advanced. Therefore, to order taxpayer money to be spent on a questionable claim would do harm to the

public interest. This Court concludes that the balance of the equities weighs against granting the preliminary injunction because of the extreme public importance of pension disputes. See Nonnenmacher, 722 A.2d at 1203.

D

Preserving the Status Quo

With respect to a preliminary injunction, this Court's final inquiry typically is whether the preliminary injunction would preserve the status quo. Iggy's Doughboys Inc., 729 A.2d at 705. The Plaintiff argues that the preliminary injunction would "restore" the status quo of Plaintiff receiving pension benefits. Defendants counter that as Plaintiff has now been without his pension payments for nearly a year, the status quo is an absence of payments.

Our Supreme Court has not recently expanded upon the definition of "status quo" in the context of a preliminary injunction. However, in 1977, that Court held that the status quo is "the last peaceable status prior to the controversy." E.M.B. Assocs., Inc. v. Sugarman, 118 R.I. 105, 108, 372 A.2d 508, 509 (1977) (quoting 11 Wright & Miller, Federal Practice and Procedure § 2948 at 465 (1973)) (defining "status quo" in the context of a restraining order). This definition comports with the definition applied to "status quo" in many other jurisdictions. State ex rel. McKinley Auto., Inc. v. Oldham, 584 P.2d 741, 743 (Or. 1978) (holding that "status quo" is "not necessarily the state of affairs that exists at the time the suit was filed . . . [but] should be the last undisputed state of affairs that existed before the events that gave rise to the pending controversy occurred"); Bowling v. Nat'l Convoy & Trucking Co., 135 So. 541, 544 (Fla. 1931) (defining "status quo" as "the last actual, peaceable, noncontested condition which preceded the pending controversy"). Under this definition, the status quo in this case would be active pension payments for Mr. Sauro because that was the condition that existed prior to the pension dispute.

However, two considerations reduce the weight of this Court's finding that restoration of Mr. Sauro's pension would maintain the status quo. First, Plaintiff allowed eight months to elapse between the suspension of his pension and the filing of the instant matter. This delay is explained in the Plaintiff's reply memorandum. The Court is aware of the claim that a great deal of research needed to be done to prepare for this complex case. However, a hearing on a preliminary injunction is generally completed on more succinct grounds. The Court can then address those issues or consolidate the preliminary injunction with a trial on the merits and advance such a hearing on the Court's docket. See Super. R. Civ. P. 65(a)(2). Even with an explained delay, such delay has evolved to the point where Plaintiff refers to the state of existence nearly a full year prior to the Court's consideration and Decision.

Given that the pension has been suspended for almost a year, a preliminary injunction would be mandatory in nature because the Court would be ordering the City to reinitiate payment of the pension. King, 919 A.2d at 995 (defining a mandatory preliminary injunction as one that "commands action from a party rather than preventing action"). As discussed below, our Supreme Court has noted that "[w]hen an injunction mandatory in its nature is asked for, a stricter rule obtains than when an injunction that preserves the status quo is sought." Id. at 1000. Therefore, although this Court concludes that granting a preliminary injunction would maintain the status quo, it reduces the weight of that finding in light of Plaintiff's delay in filing suit and the mandatory nature of the requested injunction.

E

Very Clear Right

As just stated, Plaintiff, in fact, seeks an injunction that is mandatory in nature. See King, 919 A.2d at 995 (defining a mandatory preliminary injunction as one that "commands

action from a party rather than preventing action"). A mandatory preliminary injunction requires a greater showing than an ordinary preliminary injunction. Id. In addition to the four prongs already discussed above, a mandatory preliminary injunction also requires "a showing of 'very clear' right and 'great urgency.'" Id. (quoting Giacomini, 118 R.I. at 65, 372 A.2d at 67).

As noted in section II(A) above, Plaintiff's likelihood of success on the merits is somewhat shaky. None of Plaintiff's claims rise to the level of very clear right as this Court has noted that additional factual development is required on many if not most of the claims. The numerous factual questions remaining, as well as this Court's observations during the hearing, lead the Court to conclude that Plaintiff has not demonstrated a very clear right on any of his claims, especially on the issue of whether the Defendants acted within their authority to suspend his pension for failure to appear at the October 2013 IME.

F

Great Urgency

Even if this Court found that Plaintiff did have a very clear right to a preliminary injunction, the Court would additionally have to find that there was a "great urgency" in granting the requested relief. Id. at 995. As this Court has noted on numerous occasions throughout this Decision, Plaintiff did not come to this Court until the end of August 2014, some eight months after suspension of his pension, before filing the instant suit. The Court does recognize that, procedurally, Plaintiff was first required to file a Notice of Claim with the City and wait sixty days before he could appeal the Board's decision to the courts. However, sixty days is only a quarter of the time that actually passed between the suspension of the pension and the filing of the Complaint. Additionally, this is not an appeal. Plaintiff is not appealing the Board decision but has instead filed an independent cause of action under federal law. Therefore, Plaintiff was

not required to wait the sixty days before proceeding with this Court. The Court has also already addressed that Plaintiff's claim of extensive research is insufficient to justify the lengthy delay in requesting a preliminary injunction.[57] The only harm Plaintiff sustains at this point in time is monetary harm, which this Court has already concluded is insufficient to even rise to the level of irreparable harm. Therefore, this Court concludes that Plaintiff has presented no evidence to support a finding of great urgency for a grant of preliminary injunction.

III

Conclusion

This Court finds that while Plaintiff may ultimately succeed on some of his claims, he has not demonstrated a reasonable likelihood of success on the claims relative to the final suspension of his pension. Additionally, even if Plaintiff did have a reasonable likelihood of success on the merits, the Court finds—upon weighing the evidence presented—that the likelihood of success certainly does not give rise to a very clear right to the return of his pension. The Plaintiff also has not alleged sufficient irreparable harm or great urgency, and the equities balance in favor of Defendants in light of the public interest. Accordingly, this Court denies Plaintiff's Motion for Preliminary Injunction. Counsel for Defendants shall submit an appropriate order for entry.

[57] See section II(D).

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Sauro v. James Lombardi, et al.**
CASE NO:	**PC-2014-3388**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**December 2, 2014**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
For Plaintiff:	**Joseph J. Voccola, Esq.** **Thomas F. Connors, Esq.**
For Defendant:	**Kenneth B. Chiavarini, Esq.**