

Ottosen Britz Kelly Cooper & Gilbert, Ltd.

Legal Insights

Vol. 14, No. 1

for Fire Protection Districts

Winter 2007

Court finds commission is without jurisdiction to hear a disciplinary charge

by Paula Tipton Wallin

The board of fire, police and/or public safety commissioners ("Board") of any Illinois local government is required by Illinois law to conduct a fair and impartial hearing within thirty (30) days upon the filing of written charges against an officer or member of the fire or police department (see 65 ILCS 5/10-2.1-17 and 70 ILCS 705/16.13b). While the statutes allow for the hearing to be continued from time to time, the failure to begin the hearing within the statutory time limit divests the Board of its authority (or jurisdiction), over the case (see *Kvidera v. Board of Fire & Police Commissioners of Village of Schiller Park*, 192 Ill.App.3d 950, 956 (1st Dist. 1989)). A delay in starting the hearing is only excusable when the delay is attributable to the plaintiff's behavior and not attributable to the Board. Collectively, these provisions are referred to as the "thirty-day rule." The impact of failing to comply with the thirty-day rule was recently made clear in *Cesario v. Board of Fire, Police and Public Safety Commissioners of the Town of Cicero*, 368 Ill.App.3d 70 (1st Dist. 2006).

In April 1998, after an investigation, the Town of Cicero ("Town") charged Officer Cesario with using excessive force during an arrest and lying to internal affairs investigators. The Board promptly began disciplinary proceedings on the charges. On May 5, 1998, during a hearing, Cesario's attorney waived the thirty-day rule. Later that year, Cesario sought pension benefits for a disability. The Board and Cesario mutually agreed to voluntarily dismiss the charges without prejudice pending a decision on Cesario's petition for disability benefits.

Disability benefits were granted to Cesario, and in November 1999, the Town moved to recommence the disciplinary proceedings against Cesario before the Board.

Continued on page 2

Court provides guidance on adjudicating mental disability pension claims involving firefighters

by Carolyn Welch Clifford

Until recently, firefighter pension fund boards had little guidance in evaluating a mental disability application of a firefighter. While there has been a plethora of case law involving police officers with mental disability claims, the only reported case in Illinois involving a firefighter was *Graves v. Pontiac Firefighters' Pension Board*, 281 Ill.App.3d 508 (4th Dist. 1996). However, in the recent decision of *Hammond v. The Firefighters Pension Fund of the City of Naperville*, ___ Ill.App.3d ___, 2006 WL 3490420 (2nd Dist. 2006), the Second District Court has now provided some guidance for firefighter pension fund boards. In *Hammond*, the court upheld the Board's decision to award a firefighter a non-duty disability pension -- and deny a line-of-duty disability pension -- due to his psychological condition.

In early 2001, City of Naperville firefighter John Hammond experienced episodes of depression and anxiety, including lightheadedness, dry mouth, shortness of breath, chest discomfort, panic symptoms, and general loss of composure, all of which significantly affected his work performance. In September 2001, Hammond lost his composure following an incident with another firefighter, and then broke down in the presence of superior officers who approached him to discuss the incident. In early 2002, Hammond was reprimanded for an incident during his annual physical, which a nurse perceived as sexual harassment. Shortly thereafter, he reported experiencing symptoms of anxiety while delivering a baby on the job, and he expressed doubts regarding his ability to continue to perform his job.

During the period between January 2001 and June 2003, Hammond was referred to a psychiatrist and began to receive counseling from a licensed professional. He was placed on administrative leave, referred to a psychologist, and assigned to alternate duty. He then returned to full-time duty, but was soon reassigned to administrative duties and referred to another psychiatrist. On June 25, 2003, he applied to the Board for line-of-duty disability benefits.

Shortly after submitting his disability application, Hammond received two separate psychological evaluations from physicians who concluded he suffered from "very significant" depression, anxiety, and panic attacks. Two of the physicians linked Hammond's symptoms "very directly to the cumulative trauma, demand, and pressure of his job as a fireman/paramedic." Hammond submitted these evaluations to support his application. Hammond was then evaluated by an independent psychologist appointed by the pension board, as well as by three Board-appointed independent psychiatrists, two of whom

Continued on page 2

Disciplinary charge

Continued from page 1

On December 6, 1999, the Board held a hearing to rule on a motion to reinstate the disciplinary charges and to issue a written record of their ruling. However, much of the written record was lost, and as the trial court noted, "...while it was clear that at some point the motion to reinstate was granted, there is no record of this." The Board heard evidence related to the charges on August 20, 2000, and October 10, 2000. On September 9, 2003, the Board issued its final order holding that the evidence substantiated the charges. As a result, the Board terminated Cesario's employment as a Cicero police officer. Subsequently, Cesario petitioned for administrative review, wherein the trial court concluded that the Board was without jurisdiction over the matter and vacated the Board's final order. The Town appealed.

The appellate court noted that upon a voluntary dismissal, the plaintiff has thirty days to vacate the dismissal and absent a request to set aside the dismissal at the time of the dismissal, the court has no power to reinstate the cause of action. Under the circumstances, with Cesario's voluntary dismissal of the charges, the Town could not recommence the hearing without refiling the disciplinary charges. Refiling disciplinary charges creates a new action and is not a continuation of prior proceedings. Thus, in this matter any waiver of the thirty-day rule by Cesario's attorney prior to the voluntary dismissal and prior to the refiling of charges has no bearing on the new action.

Since the record did not indicate when the Board allowed the Town to refile the charges, the record did not support a conclusion that the Board began the proceedings on the refiled charges within thirty days. The court noted, "...there is no presumption in favor of the jurisdiction of administrative agencies, the facts upon which their jurisdiction is founded must appear in the records." (See *Kahn v. Civil Service Commission*, 40 Ill.App.3d 615, 618 (1st Dist. 1976)) On appeal, the Commission argued that since Cesario requested time to respond to the motion to refile the charges, Cesario waived the thirty-day provision. The court rejected this argument, indicating that the responsibility to commence proceedings in a timely manner rests on the Board, and a request for time to respond does not amount to a waiver of the thirty-day rule.

Continued on page 4

Mental disability pension claims

Continued from page 1

concluded that he was disabled. However, only two of the psychiatrists found Hammond's disability to be duty-related, while the psychologist and the third psychiatrist determined it was non-duty related.

At the end of the two-day hearing in December 2004, the Board voted to award Hammond a non-duty disability pension and deny his request for a line-of-duty disability pension. The Board directed its counsel to draft an order reflecting its decision. However, before the order was drafted, the Board mailed a memorandum to Hammond, apprising him of the amount of the non-duty disability pension benefit. In response, Hammond filed a complaint for administrative review on January 11, 2005. The Board's motion to dismiss the complaint on the grounds that it was premature was unsuccessful. Ultimately, on April 27, 2005, the Board adopted a detailed written Findings and Decision which was forwarded to Hammond. Upon receipt of the written decision, Hammond filed a second complaint for administrative review. Since two complaints for administrative review had been filed based on the same Board's decision, the trial court consolidated the two proceedings, and granted the Board's motion to dismiss the second complaint. The trial court then affirmed the Board's decision to grant Hammond a non-duty disability pension. Subsequently, Hammond appealed both the trial court's dismissal of his first complaint for administrative review and its decision to uphold the Board's ruling.

The court first addressed the issue regarding jurisdiction of the trial court. The court considered whether the initial memorandum sent to Hammond informing him of the pension benefit amount prior to issuance of the formal Findings and Decision was sufficient to trigger the thirty-five day limitation period to seek administrative review under the Administrative Review Law (735 ILCS 5/3-103). The court found that the memo initially sent to Hammond was sufficiently clear to inform him that it was not intended to serve as a "full expression" of the Board's decision and that a formal, complete written decision was to follow. Consequently, the court held that the written Findings and Decision issued on April 27, 2005, triggered the thirty-five day limitation period, not the prior memorandum sent to Hammond that simply apprised him of the amount of the pension benefits.

In reviewing the Board's decision to deny a line-of-duty disability pension, the court examined the evidence presented at the original hearing, and found that the Board's decision to award a non-duty disability pension and deny a line-of-duty disability pension was not clearly erroneous. The court reviewed the decision in *Graves* which had held that a firefighters' "general job dissatisfaction or job stress arising from the inability to handle general duties does not give rise to a duty-related disability pension." In *Graves*, the court indicated that even where general aspects of a firefighter's duties cause or contribute to a psychological disability, "stress or depression resulting from general employment functions inherent in the occupation and common to all firefighters [is] not the equivalent of the specific acts of duty contemplated by the statute."

However, the problem with *Graves* was that it relied on case law involving police officers' claims for mental disability pensions

Continued on page 3

Section 207(k) status of paramedics under FLSA remains unclear despite new test

by John Kelly and Matt Roeschley

Under Section 207(k) of the Fair Labor Standards Act (FLSA), fire protection or law enforcement employees of a public employer qualify for a partial overtime pay exemption, which allows the employer to calculate overtime based on an extended work schedule, typically a twenty-eight day schedule. However, whether “dual-function” paramedics – trained and certified in both advanced life support and fire suppression – qualify for the Section 207(k) exemption as fire protection employees hinges on whether they are found to have a “responsibility” to fight fires. Consequently, the question of what constitutes a “responsibility” to fight fires for the purposes of Section 207(k) frequently has been addressed by the court, but remains largely unresolved.

A 2005 ruling by the Ninth U.S. Circuit Court of Appeals was expected to clarify this issue. In *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), the Ninth Circuit established a six-part test to determine whether a dual-function paramedic possessed the firefighting responsibilities necessary to qualify the paramedic for the Section 207(k) partial overtime exemption. After the *Cleveland* decision, the U. S. Department of Labor (DOL) issued an opinion letter detailing the following six eligibility requirements for the partial overtime exemption:

1. Their ambulance carries fire-fighting equipment or breathing apparatuses;
2. Their dispatchers assume they are sending at least one dual-function paramedic to each call;
3. Their ambulances are always dispatched to fire scenes, and the personnel on board notify the incident commander that they are dual-function paramedics;
4. They are expected to wear fire-protective gear (including the same color helmet as firefighters, so that incident commanders can identify them as fire-suppression resources);
5. They perform medical services as their primary responsibility, but also routinely perform fire-suppression activities alongside other firefighters; and
6. They routinely perform fire suppression, undergo fire-suppression training, and participate in fire prevention awareness programs.

Originally, it was anticipated that the *Cleveland* six-factor test would simplify determinations of partial overtime pay exemption eligibility under Section 207(k). However, two recent federal district court decisions indicate that application of the six factors may not lead to more consistent court decisions.

In *Weaver v. San Francisco*, 2006 WL 2411455 (N.D.Cal.), the U.S. District Court for the Northern District of California used the six-factor test to analyze whether dual-function paramedics should be eligible for the partial overtime exemption. The court determined that the paramedics satisfied four of the six factors: (1) their ambulances contained breathing apparatuses; (2) they were

Continued on page 4

Mental disability pension claims

Continued from page 2

which apply a different definition of “act of duty” for purposes of analyzing the duty-relatedness of a disability claim. Recently, in *Jensen v. East Dundee Fire Protection District Firefighters’ Pension Fund Board of Trustees*, 362 Ill.App.3d 197 (2nd Dist. 2005), the Second District court made it clear that “act of duty” for a firefighter is different than that of a police officer. Using the definition found in Section 6-110 of the Illinois Pension Code, “act of duty” means “[a]ny act imposed on an active fireman by the ordinances of a city, or by the rules or regulations of its fire department, or any act performed by an active fireman while on duty, having for its direct purpose the saving of the life or property of another person.” (40 ILCS 5/6-110)

The court pointed out that there was conflicting evidence as to the cause of Hammond’s psychological condition. The court opined that even if it were possible for Hammond to receive a line-of-duty disability pension for a disability caused by general occupational pressures (contrary to *Graves*), the Board’s decision was still not clearly erroneous in light of the evidence. While the court noted that Hammond may have experienced severe job related stress, it also pointed to evidence that showed his job related stress may have triggered or exacerbated pre-existing symptoms or may have simply stemmed from his personality. The court explained that:

Although plaintiff may have experienced severe stress on the job, the Board apparently was persuaded by evidence that plaintiff’s duties merely *triggered symptoms* of one or more disorders rooted in nonoccupational sources. There was evidence that plaintiff’s inability to function as a firefighter resulted from features of his personality, including poor interpersonal skills and excessive sensitivity to criticism or disapproval from authority figures, and that other personal problems – marital difficulties and the death of plaintiff’s parents – contributed to plaintiff’s occupational problems. In other words, although plaintiff may have suffered acute stress in certain occupational situations, the underlying causes were external to,

Continued on page 4

Section 207(k)

Continued from page 3

"required to don 'turn-out coats' (a type of protective gear) when they arrive[d] at the fire scene;" (3) the dispatchers were aware they were "sending dual-function paramedics to call;" and (4) the paramedics' ambulances were "automatically" dispatched to fire scenes.

However, because neither the *Cleveland* decision nor the subsequent DOL opinion letter provided guidance as to the number of factors that must be met to qualify for the Section 207(k) exemption, the *Weaver* court did not consider the six factors as proof dispositive that the paramedics had a "responsibility" to fight fires. Instead, the *Weaver* court considered other evidence showing that, at most, half of the paramedics occasionally performed "peripheral" fire suppression activities. Following language used by the *Cleveland* court, which ruled that dual-function paramedics "must have some real obligation or duty to [engage in fire suppression]," the *Weaver* court concluded that the paramedics did not have a "'real obligation or duty' to quell fires," and thus did not qualify for the Section 207(k) exemption.

In a second ruling on this issue, the U.S. District Court for the Eastern District of Pennsylvania found dual-function paramedics eligible for the exemption. In *Lawrence v. City of Philadelphia*, 2006 WL 2847330 (E.D.Pa.), the plaintiff paramedics met fewer of the DOL criteria than did *Weaver* paramedics. The *Lawrence* paramedics carried breathing apparatuses and were provided fire protective gear, but met none of the four remaining factors and only responded to fire calls "infrequently." Still, the *Lawrence* court determined that the paramedics had sufficiently established a "responsibility" to qualify them for the partial overtime exemption under Section 207(k). While the *Weaver* court had relied heavily on the infrequency of the paramedics' responses to fire calls, the *Lawrence* court focused on a written code of conduct signed by the paramedics, which acknowledged their "responsibility to render Fire Suppression" upon graduating from the fire academy.

The divergent outcomes of these two cases illustrates the ongoing confusion regarding the degree of firefighting responsibility necessary to qualify dual-function paramedics for the Section 207(k) exemption, even after the six-factor test set forth in *Cleveland*. ■

Mental disability pension claims

Continued from page 3

and independent of, his duties as a firefighter/paramedic. As such, the Board's decision to deny plaintiff a line-of-duty disability pension was not clearly erroneous.

The decision is significant from the standpoint that now firefighter pension funds have some guidance on how to properly apply the "act of duty" standard applicable to firefighters in evaluating mental disability claims. The decision provides some framework in sorting through the evidence in determining at what point the inherent stress of firefighting will trigger a line-of-duty disability pension. ■

Disciplinary charge

Continued from page 2

Finally, the Board argued that even if it had lost jurisdiction, jurisdiction was re-vested when Cesario participated in the hearings without objection. The Board relied on the doctrine of re-vestment available to courts that have both personal and subject matter jurisdiction over a matter. However, unlike a court of general jurisdiction, a board is an administrative agency and has only the authority granted by the legislature to act. The court noted that since the state legislature has determined jurisdiction terminates upon failure of a board to proceed in a timely manner, the courts are without authority to re-vest a board with jurisdictional power.

Without evidence in the record to show that the Board began the hearings within thirty days of the refiling of the charges and without evidence that Cesario delayed the hearing, the court concluded that the Board had no jurisdiction and its final order was properly vacated by the trial court. The clear message from this case is not only for boards to carefully preserve the record, but also to make sure evidence supporting both the filing of the charges and the start of the hearing is part of the record. Commissioners must follow the letter of the law and ensure that state statutes and case law are followed to preserve the board's authority over disciplinary charges. ■

Ottosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, ***Legal Insights for Fire Protection Districts***, is issued periodically to keep its clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

300 S. County Farm Road, Third Floor, Wheaton, Illinois 60187
(630) 682-0085 FAX (630) 682-0788

www.obkcg.com

Carolyn Welch Clifford, Editor cclifford@obkcg.com

Copyright 2007 by OTTOSEN BRITZ KELLY

COOPER & GILBERT, LTD. All rights reserved.

Pursuant to Rules 7.2-7.4 of the Illinois Rules of Professional Conduct, this publication may constitute advertising material.

