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Advisory for prospective candidates for elected offices

by Ericka J. Thomas

A recent First District Appellate Court decision should cause prospective elective municipal office candidates to review eligibility requirements prior to filing their nomination papers. In *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 373 Ill.App. 3d 866 (1st Dist. 2007), a simple outstanding fine prevented a candidate from placing his name on the ballot.

Earlier this year, John Cinkus filed nomination papers to be a candidate for village trustee in the Village of Stickney. An objection was filed based upon an allegation that Cinkus was ineligible for office pursuant to Section 3.1-10-5(b) of the Illinois Municipal Code (65 ILCS 5/3.1-10-5(b)) because he owed money to the Village of Stickney for an overdue disorderly conduct citation. Although Cinkus attempted to pay the outstanding debt on two occasions after he filed his papers, the Village officials refused to accept the payment. The Municipal Officers Electoral Board sustained the objection and found Cinkus ineligible to run for the office of village trustee. Cinkus then filed an action for judicial review claiming that the Board's decision was contrary to law and violated his due process rights. The trial court agreed with Cinkus and reversed the Board's decision. The Board then filed an appeal of the trial court's ruling.

The First District noted that the sole question presented was the interpretation of Section 3.1-10-5(b) of the Illinois Municipal Code. The Board alleged that under this section, Cinkus was ineligible to run for the office of trustee because he was in arrears on a debt owed to the Village at the time he filed his nomination papers. However, Cinkus maintained that Section 3.1-10-5(b) applied to ineligibility to hold an elected office, not ineligibility to run for an elected office.

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Recent court rulings support immunity for EMTs

by Brian O'Connor

Two recent court rulings address immunity for paramedics and EMTs when providing emergency medical services. On June 22, 2007, the Illinois Appellate Court's First District issued its opinion in *Abruzzo v. City of Park Ridge*, ___ Ill.App.3d ___, 870 N.E.2d 1012 (1st Dist. 2007), addressing which immunity applies for failing to provide medical services. In addition, the Seventh Circuit Court of Appeals issued its opinion on July 13, 2007, in *Fagocki v. Algonquin/Lake-in-the-Hills Fire Protection District*, ___ F.3d ___, 2007 WL 2012381 (7th Cir. 2007), addressing application of the EMS Act immunity once medical services are provided.

Abruzzo v. City of Park Ridge

After weighing the application of the Tort Immunity Act versus the EMS Act, the court in *Abruzzo* applied the absolute immunity granted to municipal EMS providers under Sections 6-105 and 6-106 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 *et seq.*) over the limited immunity provided to EMS providers under Section 3.150(a) of the Emergency Medical Services Systems Act (210 ILCS 50/1 *et seq.*). In *Abruzzo*, City of Park Ridge paramedics were dispatched to a call for a "nonresponsive" patient. On arrival, the complaint alleges the paramedics did nothing to assist the patient resulting in the patient's death the next day. The circuit court found as part of its ruling that the paramedics failed to evaluate, assess, examine, diagnose, treat or document the patient's condition. The patient's estate sued, and the circuit court granted the City's motion to dismiss on grounds of immunity.

On appeal, the City argued that the absolute immunity provided under Sections 6-105 and 6-106 of the Tort Immunity Act precluded liability. As noted by the court, both sections provide that a public entity and public employees acting within the scope of their employment will not be held liable for injuries resulting from (1) failing to examine; (2) failing to adequately examine; (3) diagnosing; (4) failing to diagnose; and (5) failing to prescribe.

The patient's estate offered two counter arguments. First, the estate argued that the limited immunity provided to EMS providers under Section 3.150(a) of the Emergency Medical Services Systems Act was the applicable immunity provision in this case, since it specifically applied to the EMS providers. Section 3.150(a) provides that any person licensed under the EMS Act who provides emergency or non-emergency medical services will not be held liable for providing those services unless they act willfully and wantonly. Secondly, the estate argued that their failure to evaluate or assess

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A new Illinois law affecting firefighter and police officer pregnancy policies

by Graham Liccardi

Police officers and firefighters encounter physically demanding and stressful situations. Due to the nature of their duties, it is impossible to predict when a police officer or firefighter will be exposed to risk. While administrators are certainly aware of the daily, inherent dangers experienced by a police officer or firefighter, special attention must be paid to the extraordinary circumstances to which pregnant police officers, firefighters, and their fetuses are exposed.

Both an existing federal law (the Pregnancy Discrimination Act) and a new Illinois law effective January 1, 2008 (Public Act 95-0025) provide legal protection to pregnant police officers and firefighters in order to prevent discrimination. Local governments not only must be cognizant of their responsibility to pregnant women and their fetuses, but also must balance this responsibility with the woman's civil liberties.

Under the federal Pregnancy Discrimination Act ("PDA") (which is contained within Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e(k))), discrimination based on pregnancy, childbirth, or related medical conditions is defined as a type of sex discrimination and is prohibited. (*Tysinger v. Police Department of the City of Zanesville*, 463 F.3d 569 (6th Cir. 2006)).

The PDA discerns that the terms "because of sex" or "on the basis of sex" within Title VII, includes protection against discrimination "on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." (42 U.S.C. § 2000e(k)).

The new Illinois law protecting pregnant peace officers and firefighters amends the section of the Illinois Human Rights Act related to employment civil rights violations. (775 ILCS 5/2-102) The new Illinois law states that it is a civil rights violation "for a public employer to refuse to temporarily transfer a pregnant female peace officer or pregnant female firefighter to a less strenuous or hazardous position for the duration of her

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the patient and to follow applicable Standard Medical Orders (SMOs) constituted willful and wanton conduct by the paramedics. The estate introduced evidence that for the symptom of an unresponsive patient, the SMOs provide that the paramedics should have initiated advanced life support treatment, assessed the patient's breathing and circulation, and transported the patient to the appropriate medical center.

In finding absolute immunity applicable to the Park Ridge paramedics, the court noted that they had failed to examine, adequately examine, diagnose or adequately diagnose the patient, and as a result the Tort Immunity Act applied. The court noted that categorization as "unresponsive" in the 911 call did not rise to the level of a diagnosis, but rather a symptom. Although not expressly addressed by the court, the opinion infers that had the Park Ridge paramedics provided medical services by examining or diagnosing the patient, then the limited immunity provision of the EMS Act would apply.

In a broader context, the court noted that immunity provided under the Tort Immunity Act applied only to local public entities and public employees, distinguishing tort immunity from immunity granted under the EMS Act which applied to both public and private entities. In so ruling, the court likened the immunity provided by the EMS Act to public and private entities to the immunity granted under the School Code (*Heinrich v. Libertyville High School*, 186 Ill.2d 381 (1999)), as opposed to immunity granted to public entities and public employees in the Domestic Violence Act (*Moore v. Green*, 219 Ill.2d 470 (2006)).

Fagocki v. Algonquin/Lake-in-the-Hills Fire Protection District

In *Fagocki*, a patient suffered a severe allergic reaction to peanuts while eating at a Chinese restaurant. Her husband drove her to the nearby immediate care center, but she was comatose upon arrival. The paramedics responded to a 911 call to transport the patient from the care center to a hospital for proper treatment. Based upon the patient's condition, attempts to intubate the patient were undertaken. Because the patient's jaw was clenched shut, the first two attempts were unsuccessful. Intubation was successful on the third attempt after three rounds of medication to relax the patient's clenched jaw. Upon arrival the emergency room staff discovered the intubation tube was inserted in the patient's esophagus rather than trachea. The patient suffered severe, irreversible brain damage and died two and a half years after the incident.

The estate filed suit against the District with the jury finding for the patient and against the District. The District filed an appeal with the federal appellate court which reversed the judgment as a matter of law, and remanded the case with directions to enter judgment in favor of the defendant District. The court looked to the immunity provided by Section 3.150(a) of the EMS Act (210 ILCS 50/3.150(a)) which provides that licensed emergency medical service providers "who in good faith provide[] emergency ... medical services ... in the normal course of conducting their activities, or in an emergency, shall not be civilly liable as a result of their acts or omissions in providing such services unless such acts or omissions ... constitute willful and wanton misconduct."

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The court considered the meaning of “willful and wanton” in various Illinois court rulings, noting the challenge posed by the lack of a uniform definition and the difficulty in applying a general statement to fact-specific circumstances. The court found that various acts or omissions by the paramedics did not rise to the level of being willful and wanton misconduct, including their failure to detect the improper intubation of the patient, the timing of the re-intubation efforts, and the sequence of medication administered to the patient. The court dismissed their failure to follow the applicable Standing Medical Orders (SMOs), noting that SMOs were “to be followed only ‘as circumstances allow’” and that strict adherence to SMOs would create “the perverse incentive” preserving the statutory immunity at the cost of needlessly endangering persons needing emergency care.

Lessons of *Abruzzo and Fagocki*

Under the Tort Immunity Act, EMTs employed by public entities are provided absolute immunity for failing to examine or adequately examine, to diagnose or adequately diagnose, or to prescribe for a patient. Once emergency or non-emergency medical services are provided by properly licensed EMTs -- of both public and private entities in the course of their duties -- the immunity of the EMS Act becomes applicable. ■

Attorney Notes

- **OBKC&G, Ltd.** attorneys spoke at the Illinois Association of Fire Protection Districts Annual Conference held June 21-24, 2007, at the Prairie Capital Convention Center in Springfield, Illinois. **Karl Ottosen, Thomas Gilbert, Stephen DiNolfo, and Shawn Flaherty** took part in a “Legal Open Forum – Panel of Attorneys.” In addition, **Shawn Flaherty** and **Joseph Miller** conducted a “Legal Update.” **Karl Ottosen** addressed “Employment Issues in the Career Department,” and **Stephen DiNolfo** discussed “Current Liability Do’s and Don’ts.” **Thomas Gilbert** and **Donald Potts** spoke on “Establishing an Article 4 Pension and Update on Pension Issues.”
- **Shawn Flaherty** and Alton attorney, Jim Sinclair, have co-authored the 2007 edition of the “Handbook for Trustees of Illinois Fire Protection Districts” published by the Illinois Association of Fire Protection Districts. This IAFFPD Handbook is a practical summary of the laws applicable to Illinois fire protection districts. Copies of the handbook are available at the IAFFPD website at www.iaffpd.org.
- **Shawn Flaherty** and **Carolyn Welch Clifford** were featured speakers at the Illinois Government Financial Officers Association’s Training Program, *Basics of Public Pension Management*, on Thursday, April 26, 2007, at Northern Illinois University’s Naperville Campus. Shawn discussed “Permissible Investments and Investment Law,” and Carolyn addressed “Disability Issues.”

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Pregnancy policies

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pregnancy if she so requests, with the advice of her physician, where that transfer can be reasonably accommodated.” (775 ILCS 5/2-102(H))

Police or fire departments have many safety concerns that must be considered when drafting a pregnancy policy. In view of the duties of a pregnant police officer and/or firefighter, the local government must primarily consider the safety of the general public, other employees, as well as the pregnant employee. However, a policy that excludes pregnant women from performing a specific job because they are pregnant is facially discriminatory.

In *International Union v. Johnson Controls*, 499 U.S. 187 (1991), a battery manufacturer adopted a policy excluding women capable of bearing children from working in jobs that exposed them to lead, a major component of batteries. The policy defined women capable of bearing children as “all women except those whose inability to bear children is medically documented.” The U.S. Supreme Court noted that the policy was facially discriminatory because of the clear bias against fertile women and not fertile men.

The Court discerned that the protection of an unborn fetus is not a business necessity and that infertility is not a bona fide occupational qualification for working in a lead plant. A local government’s pregnancy policy cannot exclude pregnant women or women who may potentially become pregnant solely based on concern for the safety of the fetus. There must be a relevant business necessity or legitimate job requirement that warrants excluding pregnant women from working at a specific job.

In order to avoid pregnancy discrimination and to comply with federal and Illinois law, local governments must honor a pregnant police officer’s or firefighter’s request to temporarily transfer to a less strenuous or hazardous position for the duration of her pregnancy and the months following birth while nursing, if necessary, when the transfer can be reasonably accommodated. (775 ILCS 5/2-102(H))

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The First District initially considered the wording of Section 3.1-10-5(b) which provides, "A person is ineligible for an elective municipal office if that person is in arrears in the payment of a tax or other indebtedness due to the municipality or has been convicted in any court located in the United States of any infamous crime, bribery, perjury, or other felony." (65 ILCS 5/3.1-10-5(b)) The court noted that no Illinois court had addressed the eligibility of a candidate who is in arrears of a tax or other indebtedness, but that there had been several Illinois courts who had considered the eligibility of candidates who had felony convictions. The court noted that the disqualifying language in Section 3.1-10-5(b) remains the same for both felons and debtors, and should be applied consistently.

The court also noted that the Election Code allows convicted felons to recover their right to run for office through the terms of a pardon or otherwise according to law. Similarly, a debtor can regain his eligibility by paying all of his outstanding debts by the time the nomination papers are filed. The court ultimately held that the Board's decision was correct, and Cinkus was ineligible to run for trustee of the Village of Stickney because he was in arrears on his fine at the time he filed his nomination papers. ■

Ottosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, **Legal Insights for Local Governments**, 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:

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Pregnancy policies

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A pregnancy policy should require the officer or firefighter to provide proof of pregnancy, and additionally, a letter from the pregnant woman's physician recommending less strenuous duty should be requested. (775 ILCS 5/2-102(H))

Under federal and Illinois law, it is necessary to recognize that a pregnant police officer's or firefighter's request for temporary reassignment is strictly voluntary. Unless it is clear that the pregnancy is impeding the individual's ability to perform her regular duties, endangering herself, other employees or members of the public, the local government cannot force the pregnant employee to accept a temporary reassignment. The local government can request documentation from the pregnant police officer's or firefighter's physician.

Unless pregnant employees differ from other employees "in their ability or inability to work," they must be "treated the same" as other employees "for all employment-related purposes." In order to avoid charges of pregnancy discrimination, the local government should treat pregnant police officers or firefighters in the same manner as similarly-situated non-pregnant police officers or firefighters.

Pregnant police officers and firefighters who are able to work must be permitted to work under the same conditions as other police officers and firefighters. A local government's pregnancy policy must leave the decision to request a less strenuous position during the pregnancy to the woman and her physician, unless it is apparent that her pregnancy is impeding her ability to perform her job functions. With the exception of a bona fide job requirement that warrants excluding pregnant women, a policy excluding pregnant women from working is discriminatory. ■

Attorney Notes

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- **Shawn Flaherty** was a featured speaker at Northern Illinois University Law Review's 16th Annual Law Review Symposium, *Emerging Issues in Election Law*, on Monday, March 26, 2007 in Altgeld Hall in DeKalb, Illinois. Shawn participated in the morning presentation and presented his law review paper entitled "Dollars, CPI, and Voter Empowerment: Public Act 94-976 and its Impact on Local Government Tax Referenda."
- **John Kelly** was the closing session presenter on "Liability and Privacy Issues in the 9-1-1 Center" at the National Emergency Number Association Annual Conference held in Charlotte, North Carolina on June 14th.
- **Carolyn Welch Clifford** attended the National Association of Public Pension Attorneys' 2007 Legal Education Conference, June 26-29 in Vail, Colorado. The conference workshops included programs on Sudan Divestment, a Litigation Update, and the Pension Protection Act and Determination Letter Process. ■

