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**Legal Insights**

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for Fire Protection Districts

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**P.A. 95-25 and the pregnant firefighter**

**by David Zafiratos**

A new section of the Illinois Human Rights Act makes it a civil rights violation for a public employer to refuse to temporarily transfer a pregnant female firefighter to less strenuous or less hazardous duty. Public Act 95-25 adds the following language to the Act:

It is a civil rights violation . . . [f]or a public employer to refuse to temporarily transfer a pregnant female peace officer or pregnant female fire fighter to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where that transfer can be reasonably accommodated. For the purposes of this subdivision (H), 'peace officer' and 'fire fighter' have the same meanings ascribed to those terms in Section 3 of the Illinois Public Labor Relations Act. (775 ILCS 5/2-102(H))

As with any new law, there are many concerns associated with P.A. 95-25. However, some concerns cannot be addressed until courts have an opportunity to decide specific issues in cases. Nonetheless, as public employers begin to encounter situations relating to P.A. 95-25, they should keep in mind the following issues:

The new law marks a significant change in the obligations facing public employers. Even prior to P.A. 95-25, Section 2-102 of the Act prohibited discrimination in the context of public employment. What P.A. 95-25 did, however, was place an affirmative duty on public employers that the Act previously did not. Now, instead of simply refraining from discriminating against employees, public employers are required to transfer pregnant peace officers and and firefighters to less strenuous or hazardous positions. Granted, the public employer's duty is limited to situations where the employee requests a transfer, with the advice of her physician. Notably, a significant affirmative obligation is now placed on public employers.

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**Fending off the tax objector**

**by Shawn P. Flaherty**

He is often seen lurking around a suburban county clerk's office poring over local government tax extension records. Other times he might be found requesting dozens of copies of audit reports from a county treasurer. Invariably, once a year he can be located at the courthouse frustrating a deputy circuit clerk employee who is legally obligated to file his annual masterpiece: a civil complaint containing hundreds of pages brought forth against dozens of taxing districts alleging that the taxing districts improperly levied property taxes. This individual is the attorney representing the tax objectors. This attorney makes his living locating and challenging real and perceived errors in taxing district property tax levies. He is the hired gun for the commercial, office, industrial, and large-scale residential taxpayers seeking relief from ever-rising real estate taxes. He often works on a contingency fee basis, and he normally is a specialist quite familiar with this arcane area of the law.

**Procedural issues**

The procedures for filing and adjudicating property tax objections are set forth in detail in Article 23 of the Property Tax Code (35 ILCS 200/23-5 *et seq.*). The tax objections must be filed within the statutory timeframes, and the property taxes must be paid under protest while the tax objection is processed. The taxing districts named in the complaint must receive formal notification of the complaint, as well as a summary of the reasons for the tax objections set forth in the complaint. The State's Attorney of the county is responsible for defending the County Collector in all tax objections. The attorneys for the taxing districts often assist the State's Attorney in defending the case by providing documentation and argument to rebut the claims of the tax objector.

Taxing district property tax levies are assumed to be correct and legal. The tax objector has the burden of proof before the trial court to prove the taxes improper by clear and convincing evidence (35 ILCS 200/23-15). It is commonplace for the State's Attorney to agree to settle most of the tax objections filed for a percentage of the initial amounts requested. However, sometimes the matters go to trial. If the tax objector proves up his case, the court will normally order a refund of the taxes challenged plus interest for all plaintiffs who file. At times, courts have ordered that significant sums be withheld from taxing district levies to pay tax objections from previous years.

**Statutory protections**

By statute, a tax objection cannot challenge a tax levy based upon the form of the budget and appropriation (B&A) ordinance, or

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## **P.A. 95-25 and the pregnant firefighter**

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Close scrutiny of P.A. 95-25 reveals that public employers need only grant pregnant firefighters' transfer requests "where that transfer can be reasonably accommodated." If a public employer is unable to reasonably accommodate a transfer to a less strenuous or hazardous position, the employer is not required to do so. However, reasonable accommodation must not be construed as permitting public employers to force a pregnant firefighter to work throughout her pregnancy. Other pre-existing laws, such as the Family Medical Leave Act, provide for unpaid medical leave for pregnant firefighters.

Disagreement may arise as to what constitutes a "reasonable accommodation" under P.A. 95-25. That phrase has been important in cases involving alleged violations of disabled employees' civil rights under the Americans with Disabilities Act (ADA) and the Illinois Human Rights Act. Again, however, P.A. 95-25 places an affirmative duty on public employers to do something previously not required, while the existing case law involving "reasonable accommodation" addresses prevention of illegal discrimination.

The text of P.A. 95-25 refers to Section 3 of the Illinois Public Labor Relations Act when defining the terms "peace officer" and "firefighter." The Public Labor Relations Act, in turn, defines a firefighter as:

[A]ny person who has been or is hereafter appointed to a fire department or fire protection district or employed by a state university and sworn or commissioned to perform fire fighter duties or paramedic duties, except that the following persons are not included: part-time fire fighters, auxiliary, reserve or voluntary fire fighters, including paid on-call fire fighters, clerks and dispatchers or other civilian employees of a fire department or fire protection district who are not routinely expected to perform fire fighter duties, or elected officials. (5 ILCS 315/3)

It is, therefore, clear that paid-on-call, part-time firefighters, and contract paramedics are not covered by P.A. 95-25. Instead, the new law applies only to full-time firefighters and paramedics employed by fire departments, fire protection districts, and state universities.

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the degree of itemization or classification of items therein, or the reasonableness of the amount budgeted or appropriated, so long as:

(a) a tentative B&A ordinance was prepared at the direction of the taxing district and made available for public inspection for at least 30 days before the public hearing and action on the ordinance;

(b) at least one public hearing on the tentative B&A ordinance has been held prior to adoption and the taxing district has complied with the 30 day advance publication notice; and

(c) the final B&A ordinance is substantially identical as to the matters which objection is made as the tentative B&A ordinance submitted at the public hearing unless the tax objector has made his or her objection known in writing to the same taxing district prior to the adoption of the B&A ordinance.

Fire protection districts are provided this statutory protection, while villages, cities, and counties among other taxing districts are not so protected (35 ILCS 200/23-35).

Certain errors in the drafting, certifying or filing of a levy ordinance and related documents are also immune from tax objections provided that the levy ordinance is properly amended and the aggregate amount of the levy is not increased. (35 ILCS 200/23-40)

### **Common objections raised**

**Excess accumulation objections:** This is the most common tax objection. The objector argues that the entire special purpose levy (i.e., Liability Insurance, Audit) for a given year is not authorized by law because the taxing district has accumulated well in excess of the average annual expenditure over the three preceding years. Normally, the objector initiates this objection if the accumulated assets in the fund exceeded two times the average annual expenditure.

**Truth in Taxation Act noncompliance:** The taxing district levy is challenged to the extent that the levy exceeded 105% of the prior year extension because the taxing district is alleged to have failed to comply with the publication and hearing requirements of the Truth in Taxation Act.

**Audit failings:** The tax objector locates flaws in the annual financial report or audit report as support for the argument that a certain fund levy is contrary to state law. One recent wrinkle takes taxing districts to task for failing to provide a "separate and distinct accounting" for special purpose funds in the annual financial report.

**Improper county calculations:** Challenges to the manner in which a county clerk calculated a limiting rate or tax rate increase referendum under the Property Tax Extension Limitation Law (PTELL) seek a refund of the difference attributable to the supposed miscalculation.

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**Challenges to bond issuances:** The tax objector challenges levies as illegal and void on the basis that bonds were improperly issued by the taxing district.

**Liability insurance / Tort immunity fund objections:** The tax objector takes issue with the expenditures paid from these funds as reported in the audit report as a diversion of assets for improper purposes.

**Fund transfers:** The tax objector asserts that funds are improperly transferred between funds, resulting in a failure to disclose the true purpose for the levy, and thus rendering it void. Improper abatement of taxes may also result in an objection.

**PTELL limitation on new rates:** A more recent argument raised by the tax objector challenges levies made in special purpose funds introduced for the first time after 1991 under the argument that all new rates must be approved by referendum. This matter has been subject to different interpretations by courts of review.

### Tips to avoid tax objections

Tax objectors and their attorneys can be very creative in crafting their objections, as creativity can often prove profitable. There is virtually no way to guarantee that the tax objector will not target your taxing district. There are some protections that taxing bodies can take to keep the tax objectors at bay:

- Ensure compliance with the Illinois Municipal Budget Act, the Truth in Taxation Act, and the levy and PTELL provisions of the Property Tax Code.
- Pay special attention to special purpose levies being cognizant of the balances on hand in these funds at the beginning of the tax year.
- Do not accumulate excess balances in special purpose funds such as audit funds, tort immunity funds, and Social Security funds. Note that pension funds are generally safe from attack on the excess accumulation issues.
- Be careful about how tort immunity tax revenues are spent. The proper uses of the tort immunity fund have shrunk over the past decade. It may be time to seek legal counsel on the permissible uses of this fund.
- Ensure that your auditors and accountants are familiar with these common tax objection issues to ensure that their work does not inadvertently expose your taxing district to additional objections.

A proactive approach in the consideration and adoption of fire protection district levy ordinances and other financial documents can help to avoid the headaches of dealing with the tax objector and protect the property tax revenue stream upon which taxing districts rely. ■

## Changes pending: public fire protection charges for private water service

by Brian J. O'Connor

In 2006, P.A. 94-950 amended Section 9-223 of the Illinois Public Utilities Act to require public hearings on the issue of fire protection fees private water providers could charge customers. P.A. 94-950 also introduced a consumer bill of rights of private water service providers, brought about by the well-publicized water bills and service challenges experienced by customers of Illinois American Water Company. Fire departments require ready access to water supplies to fight fires. In some areas, water supplies are obtained from private water companies.

From a fire service perspective, the impetus for the public hearings required by P.A. 94-950 was a general concern that consumers would wrongfully assume:

(1) any fire protection fee permitted by Section 9-223 and charged by a water company was being provided to the fire department or district serving the consumer rather than to the water company;

(2) fire departments and districts were charged a direct fee for the use of privately supplied water distribution and hydrant systems; and

(3) there was no requirement for these water companies to maintain adequate distribution systems and hydrants to provide the water supplies necessary for fire suppression.

As required by P.A. 94-950, the ICC held hearings on Section 9-223 in September and October of 2007 and must submit a report on its findings from the hearings no later than the last day of the veto session in November 2008. Representatives from various fire departments and districts attended two of the three hearings in Fairview Heights and Orland Park. Collectively, these representatives elaborated upon the following three concerns:

First, fire service speakers explained to those attending the hearings that the fee collected by the water company is not passed on to fire departments. Many consumers had assumed erroneously that the water company fee was collected by the water company and

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## Charges for private water service

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provided to the fire departments serving the consumer. Consumers also questioned the appropriateness of such a fee because they are taxed for fire service. The question remains of the potential misunderstanding of other residents relating to the fee and the double-taxation issue, along with the potential negative impact that the double-taxation misunderstanding might have upon the local fire service's reputation.

Second, the fire service speakers pointed out that the fiscal resources of fire departments are limited, not only by revenue sources, but also by the effects of the Property Tax Extension Limitation Law. Any attempt to charge a fee to a fire department or district would negatively impact an already limited and scarce resource.

Finally, several fire service speakers noted that even though the private water companies collect a fee from consumers, many private water distribution systems and hydrants are in poor condition to the point of potentially inhibiting fire suppression efforts.

Senate Bill 620 amends Section 9-223 to re-focus the need for any fire protection fee approved by the ICC for a private water company to the needs of the customers rather than the municipality or fire protection district. It also provides that the charge be specifically identified on the customer's utility bill. These proposed changes address the first and second issues raised by the fire service and consumers during the comment portion of the ICC public hearings. House Amendment 2 to SB 620 would amend Section 8-306 of the Public Utilities Act and add a new subsection 8-306(o) that would require the water company to: (1) report on the operational status of fire hydrants; (2) repair non-operational hydrants; and (3) potentially pay fines for non-compliance. While this amendment would rectify concern relating to fire hydrants, it fails to address the ability of the water distribution systems to provide a sufficient water supply for fire suppression needs.

Publication of the ICC's report on the public hearings mandated by PA 94-950 may clarify concerns and identify solutions that could facilitate positive change. Members of the fire service are positioned to revive legislation in this session to address the adequacy of the private water distribution systems to meet anticipated fire suppression needs. ■

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There are several ways public employers can prepare to handle requests by pregnant firefighters for temporary transfers. First, employers should determine in advance whether they can reasonably accommodate such transfer requests. They should assess potential job functions available to pregnant firefighters and decide whether additional functions can or should be created. Employers will need to decide if it is more sensible to establish a set of less hazardous duties if none currently exist. By creating a list of less hazardous duties, some employers may benefit from an employee's ability to perform the type of less strenuous or hazardous work contemplated by P.A. 95-25. It may be more sensible to decline transfer requests that cannot be reasonably accommodated.

Second, regardless of how employers proceed, they should integrate their decisions into official policies. Establishing a policy, or amending a current policy to comply with P.A. 95-25, will aid in avoiding any potential conflict relating to a pregnant firefighter's transfer request. The policy should state clearly what is required of a pregnant firefighter requesting a transfer. As provided by the Act, the employee should be required to request the transfer, with the advice of her physician.

Third, employers should recognize that P.A. 95-25 does not require pregnant firefighters to transfer to less strenuous or hazardous duty. It instead gives the firefighter the option of seeking a transfer. In the interest of safety, employers retain their ability to require firefighters to maintain a certain level of physical ability. However, employers should not confuse this power with the optional transfer available to firefighters under P.A. 95-25.

P.A. 95-25 has raised several other questions leading some fire departments and fire districts to adopt policies to address concerns and inquiries raised by the vagueness of the new law. Those issues will continue to be worthy of monitoring as they are addressed in the court system. ■

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