

Ottosen Britz Kelly Cooper & Gilbert, Ltd.
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The option to merge eligibility lists

by Thomas J. Gilbert

With the rapid growth of many fire protection districts in Illinois, it is not unusual for a current eligibility list of firefighter candidates to be exhausted long prior to the two year expiration period set forth in the Fire Protection District Act ("the Act") (70 ILCS 705/16.10) and the Illinois Municipal Code ("the Code") (65 ILCS 5/10-2.1-9). While it is crystal clear that the final eligibility list of candidates remains valid for two (2) years, a review of the applicable statutes demonstrates that the law does not prevent a fire protection district or municipality from conducting a new examination and "freshening" or merging the results of a new test with the current eligibility list.

The Act establishes the firefighter candidate testing process for fire protection districts and further indicates that if a provision in the Code regarding the testing and promotion process does not conflict with the Act, then that provision shall be applicable to a fire protection district's testing process. (65 ILCS 5/10-2.1-9 et seq.)

Both the Act and the Code provide separate, but consistent provisions that confirm the intent of the legislature to allow fire protection districts to merge current and new eligibility lists. It has been a common practice for some commissions to merge current and new eligibility lists, while other commissions have opted against the merger of lists in favor of the more traditional, streamlined hiring process.

A review of the applicable statutes is in order. Section 16.10 of the Illinois Fire Protection District Act clearly states: *....the Board shall strike off the names of candidates after such names have been on the list for more than two years*..... Neither the Act nor the Code bars the initiation of a new testing

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Kodish II: Extension of the probationary period deemed lawful

by Michelle Grotto and Brent Eames

In *Kodish v. Oakbrook Terrace Fire Protection District*, 2008 WL 821878 (N.D. Ill 2008), Brian Kodish, a former Oak Brook Terrace firefighter, alleged, among other claims, that the Oakbrook Terrace Fire Protection District wrongfully terminated him. In June of 2003, the District hired Kodish. At that time, the District had a policy in place classifying all newly hired firefighters as probationary firefighters until completion of a twelve (12) month probationary period. Additionally, the policy contained the following clause: "the probationary period may be extended if the employee is absent from duty for a period of more than thirty (30) calendar days continuously or more than thirty (30) duty days in the aggregate." Once the probationary period ended, however, a firefighter was entitled to all rights and privileges accorded to him or her under Illinois law.

In December of 2003, Kodish injured his knee in a non-duty accident and in March of 2004, under the advice of his physicians, he did not report for duty. In May 2004, Kodish underwent knee surgery, and his doctors released him to return to duty in July of 2004. Upon his return, the District informed Kodish that it was not responsible for his medical bills because his injury was not duty related. According to Kodish, on August 8, he and the District's fire chief discussed his medical bills, and the chief indicated to him that he should take time off to resolve the medical bill issues. Kodish agreed with the fire chief and did not report for duty on his next scheduled day. However, when Kodish returned to duty on August 12, the chief informed him that his absences were unauthorized and the Board of Trustees had voted to terminate his employment.

Kodish sued the District claiming his rights were violated and he was denied due process because he had not been terminated in accordance with the provisions established by the Illinois Fire Protection District Act (70 ILCS 705/16/13(b)). The Act provides:

"no officer or member of the fire department of any protection district who has held that position for one year shall be removed or discharged except for just cause, upon written charges specifying the complaint and the basis for the charges, and after a hearing on those charges before the board of fire commissioners, affording the officer or member an opportunity to be heard in his own defense".

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procedure and establishment of a merged list. This section of the Act would have no force, effect, or meaning if a current list had to be exhausted before merging a new list with a current list.

Similarly, the Code provides identical language in 65 ILCS 5/10-2.1-9 with regard to the two year expiration period. Additionally, Section 10-2.1-14 states*"these persons shall take rank upon the register as candidates in the order of their relative excellence as determined by examination, without reference to priority of time of examination"*..... Clearly, the legislature is reiterating language that provides for the merging of eligibility lists.

Section 16.05 of the Act (70 ILCS 705/16.05) requires the board of fire commissioners to establish rules to carry out the purposes of the Act. While commission rules typically embody the express language of the statute, a board may amend its rules to provide for the initiation of the testing process and the establishment of a merged list prior to the end of the current eligibility list. The new amendment would provide for the merger of both eligibility lists with the current rankings expiring at the end of the current two (2) year period and the new rankings expiring at the end of a new two (2) year period.

It is important to note that a candidate listed on the current eligibility list is not required to retest and would retain his or her original ranking on the merged eligibility list. However, if the candidate did not participate in the second testing process, there is a distinct possibility that his or her ranking on the merged eligibility list could drop as a result of merging the current eligibility list and the new list.

Despite provisions provided in the Act, the Code, and the fire commission rules, a disappointed applicant may still challenge this process or any part of the initial hiring process. Currently, in Will County a disgruntled candidate is contesting the right of a fire protection district to institute a new testing process prior to the end of the current eligibility list. The applicant initially filed an administrative review complaint that the court dismissed. Subsequently, that applicant filed a second complaint under a different theory that is pending before the court.

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Attorney Notes

- **Donald Potts**, one of the firm's associates in its Naperville office, has been called to active duty with the U.S. Army in Iraq, beginning in May 2008. Don is a Captain in the Army Reserve and a member of the Judge Advocate General's Corps. He will serve as a legal advisor/planner in the office of strategy, plans and assessments at Multi-National Force-Iraq headquarters in Baghdad. Don is expected to return to OBKC&G in June 2009. The firm wishes Don the best during his leave and looks forward to his safe return next year.
- Congratulations to **David Zafiratos** and his wife, **Amy**, on the birth of their daughter, **Nicole Louise**, who was born at Delnor Community Hospital on May 6, 2008, at 1:45 a.m.
- **Brian J. O'Connor** was one of three attorneys presenting at the Lorman Educational Services' all day seminar on "Public records and the Open Meetings Act" held on Friday, April 4, 2008 at the William Tell Holiday Inn in Countryside, Illinois.
- For the third consecutive year, *Illinois Super Lawyers* Magazine has recognized **Karl Ottosen** as a 2008 Illinois Super Lawyer in the area of Government Law. *Law & Politics* conducts a rigorous review, research, and selection process of nominated attorneys. Only five percent of attorneys in Illinois are recognized as Super Lawyers by their peers for their outstanding professional achievement.
- Congratulations to **Shawn Flaherty** on being selected as a "Rising Star" in the areas of Government/City/Municipal Law in the 2008 issue of *Illinois Super Lawyers* magazine. This designation is awarded to the top 2.5% of Illinois attorneys who are under the age of 40 or who have been practicing ten years or less.
- Congratulations to **Karl Ottosen**, who was listed as a leading lawyer in the areas of Governmental, Municipal, Lobbying & Administrative Law in the Leading Lawyers Network section of *Chicago Lawyer* Magazine. For the past three years, Karl has been recognized by his peers in a statewide survey to be among the top government-related attorneys in Illinois.
- **Karl Ottosen, Bob Britz, and Brian O'Connor** spoke at the Illinois Association of Fire Protection District's Administrative Training Session held at Byron Fire Protection District on Saturday, March 15, 2008. Topics covered in their presentation included: a review of recent legislation; fire district budget and levy highlights; a review of TIF/Enterprise Zone issues; and firefighter benefits. In addition, updates on court rulings, the Equal Employment Opportunity Commission, and code enforcement were discussed.

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The Substance Abuse Prevention on Public Works Act: A Summary

by **Matt Roeschley**

Contractors and subcontractors are now responsible for implementing substance abuse prevention programs and mandating drug and alcohol testing for every employee who participates in any public works project. Effective January 1, 2008, the Substance Abuse Prevention on Public Works Projects Act (820 ILCS 265/1 *et seq.*), sets forth substance abuse prevention program requirements for contractors and subcontractors and penalties for employees testing positive for drugs or alcohol.

Under the Act, a worker employed under any public works project by anyone under a contract for a public works project may not use, possess, distribute, deliver, or be under the influence of a drug, or use or be under the influence of alcohol, while performing work on a public works project. An employee is considered to be under the influence of alcohol under the Act if he or she has a blood alcohol concentration of 0.02 or above.

The Act also states that reasonable suspicion testing is permissible. A supervisor who has reasonable suspicion that an employee is under the influence of alcohol or drugs can require the employee to submit to a drug or alcohol test. If the employee tests positive for drugs or alcohol, he or she is subject to discipline up to and including suspension. Should an employee violate any of the rules in the statute (i.e., come to work under the influence or refuse to submit to a drug or alcohol test), the contractor or subcontractor must immediately remove that employee from work on a public works project. The employee may only return to work on that public works project when, among other conditions, he or she tests negative for drugs and is not under the influence of alcohol or completes a rehabilitation program.

Lastly, the Act requires each contractor or subcontractor performing a public works project to have in place, prior to the commencement of work on the public works project, a written substance abuse prevention program which meets or exceeds the program requirements found in the Act, to be filed with the public body engaged in the construction of the public works and made available to the general public. The Act requires that all drug and alcohol testing must be performed by a laboratory that is certified for Federal Workplace Drug Testing Programs by the Substance Abuse and Mental Health Service Administration of the U.S. Department of Health and Human Services.

The Substance Abuse Prevention on Public Works Projects Act will likely prove costly to many contractors and subcontractors who regularly bid on public works projects. They are responsible for the cost of developing, implementing, and enforcing their own substance abuse prevention programs, including the cost of drug and alcohol testing of employees (except when such costs are covered under the provisions of a collective bargaining agreement). Further, contractors and subcontractors must now be vigilant of any behavior that might lead a reasonable person to believe that an employee is under the influence of drugs or alcohol. Despite its costs, the Act helps to ensure that employees on public works projects will be drug-free, sober, and safe. ■

Welcome to the Firm

OBKC&G, Ltd. welcomes two law clerks. **Brent Eames** has completed his second year of law school at Northern Illinois University. Brent majored in Political Science at Western Illinois University. **James Prescott** is completing his second year of law school at the University of Illinois. Jim earned his Bachelor's and Master's Degrees from Washington University in St. Louis and previously worked as an auditor for public entities. Brent and Jim will join the firm's Naperville office in May 2008. ■

A Note from the New Editor

Our most careful readers will notice that my name has replaced the name of Carolyn Welch Clifford as Editor of the *Legal Insights for Fire Protection Districts*. The management of our Firm has decided to divide editorial responsibilities of the four OBKC&G newsletters among four firm partners to liberate Carolyn from managing all four newsletters.

My goal is to continue the excellence of this quarterly newsletter in the manner that our valued clients and friends in the fire service have come to expect. In turn, I would welcome any suggestions readers may have on possible topics for future editions of this newsletter.

Regards,

Shawn P. Flaherty

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Nevertheless, in the past many municipal departments have merged lists without incurring any legal challenges. The eligibility list merger option has advantages and disadvantages and may not be suitable for all fire departments. When properly undertaken, merging eligibility lists can provide fire commissions with a steady stream of well-qualified candidates at all times. ■

Kodish II

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Since the District had employed him in excess of twelve (12) months, Kodish believed the statute would apply to his termination. However, the District countered that the statute was inapplicable to him and reasoned that even though he had been a District employee for more than twelve (12) months, he had not completed his twelve (12) month probationary period because the District extended his probationary period by approximately four months due to absences related to his non-duty knee surgery. Therefore, the District argued that technically Kodish was not a District employee for the full twelve (12) month period required by the statute and his termination was lawful.

The federal district court agreed with the District, holding that Kodish was not entitled to the termination procedure provided under the statute because his extended absences from duty triggered the extension of his probationary period under the District's policy.

The court reasoned that the purpose of the District's probationary policy is to ensure a reasonable period to observe firefighters actually performing their duties. Since the District had properly extended Kodish's probationary period due to his non-duty related absences, he had not been a District employee for a full twelve (12) month period, and therefore was not entitled to the termination protection provided under the statute.

Kodish has appealed this matter, and it is currently pending before the U.S. Court of Appeals for the Seventh Circuit. ■

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- Several **OBKC&G, Ltd.** attorneys spoke at the Northern Illinois Alliance of Fire Protection Districts Annual Conference held January 31 – February 3, 2008, in Oak Brook, Illinois. **Karl R. Ottosen** discussed "Worker's Compensation ... How to Get Them Back" and "FLSA Re-Visited...Overtime & 7G's, Use of Part-Time or Substitute Employees." **Karl** also served as one of the moderators for the "Open Forum for Trustees." **Stephen H. DiNolfo** addressed "Employee Free Speech: Is There Any Left?" **Thomas J. Gilbert** spoke on the "Budget/Levy Process." **John H. Kelly** discussed the "Roles & Responsibilities of New Commissioners" and "Computer, Property, and Workplace Security." **John Kelly** and **Carolyn Welch Clifford** participated in an "Open Forum for Commissioners." In addition, **Carolyn** spoke on "New Pension Laws and Their Applications" and conducted a "Legal Update for Pension Funds." **Joseph Miller III** reported on "Legal Updates for Commissioners," and **Shawn P. Flaherty** discussed "Referendum Strategies (Legal, Marketing Formula for Success)." ■

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:

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