

LEGALINSIGHTS

FOR LOCAL GOVERNMENTS

OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

Volume 16, No. 2 -- Spring 2009

Seventh Circuit rules the Administrative Review Act provides sufficient due process for village employee

by Ericka J. Thomas

The Seventh Circuit Court of Appeals recently issued a decision on the sufficiency of due process provided by the Illinois Administrative Review Act in *Michalowicz v. Village of Bedford Park*, 528 F.3d 530 (7th Cir. 2008). The case arose when a Bedford Park fire inspector was terminated after twenty-eight (28) years of service. In 2003, the plaintiff was diagnosed with an often fatal form of cancer. With the permission of the mayor of Bedford Park, plaintiff's co-workers solicited donations from individuals and local businesses to help cover the costs of his medical treatment. After successfully being treated for his illness and returning to work, plaintiff received a letter from the fire chief stating that he was under investigation for accepting gifts of cash or property from businesses subject to fire inspection regulations and for failing to appropriately inspect these facilities and properties.

The plaintiff was interviewed twice by a Village attorney prior to being notified that the fire chief was seeking his termination. On the date of his termination hearing, he appeared with an attorney. Although the attorney was allowed to give a statement, he was not allowed to present any witnesses or evidence. Neither the Village nor the fire chief presented any evidence, and the meeting adjourned after the plaintiff's attorney's statement. Approxi-

mately one week later, the Board reconvened and summarily terminated the plaintiff. He was then notified of his right to a post-termination hearing before an independent employee relations committee as provided for in the Village Code. Over the plaintiff's objection, the Village Board acted as the employee relations committee. At the post-termination hearing the plaintiff presented witnesses and evidence contradicting the charges against him. However, the Village Board subsequently upheld his termination.

The plaintiff filed an action under 42 U.S.C. §1983 alleging violations of the Due Process Clause of the Fourteenth Amendment in federal court and a complaint for administrative review in Cook County circuit court. The Section 1983 action alleged that both the pre- and post-termination hearings were inadequate because they failed to comply with constitutional requirements of notice and opportunity to respond. The federal court dismissed the action for failure to state a claim and held that the Illinois Administrative Review Act provided adequate remedies for the plaintiff in seeking a review of the Village Board's failure to follow its ordinances and procedures. The plaintiff appealed the dismissal to the Seventh Circuit Court of Appeals.

The Seventh Circuit noted that

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A vexing boundary issue: bridge maintenance

by Brian J. O'Connor

Boundaries pose recurring challenges for local government entities. In *Village of Montgomery v. Aurora Township*, ___ Ill.App.3d ___, 899 N.E.2d 567 (2nd Dist. 2008), the Illinois Appellate Court recently clarified the issue of maintenance responsibility for a township bridge that connects two municipalities. Generally, the Municipal Code provides that municipal annexations include areas to the far edge of a public roadway including bridges. In the *Village of Montgomery*, the case centered on maintenance responsibility for the Ashland Avenue Bridge in southern Kane County, Illinois that connects the City of Aurora ("City") and the Village of Montgomery ("Village"). In 1958 and 1961 respectively, the City and the Village disconnected the property, and in the mid to late 1960s, Aurora Township ("Township") built a bridge on the disconnected property.

In its analysis, the court considered several useful observations. First, public roadways and bridges are held in trust by local government entities for the benefit of the public. Additionally, the entity bears the responsibility of maintaining public roadways and bridges within its boundaries. In the *Village of Montgomery*, the court noted that the Ashland Avenue Bridge was not part of the county or municipi-

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Pension Reform Law expands required annual tax levy report

by Carolyn Welch Clifford

One of the often overlooked requirements in the Illinois Pension Code has been the annual tax levy report that fire and police pension funds have been required to submit to the city council, village or fire protection district board of trustees each year. Under Sections 3-143 and 4-134, the fire or police pension board is required to report annually to the city council or board of trustees of the village or fire protection district on the condition of the pension fund at the end of its most recently completed fiscal year. (40 ILCS 5/3-143 and 4-134). This report must be made prior to the council or board's annual tax levy meeting for which the report is prepared.

In the past pension boards have relied upon audit and actuary reports to essentially transmit the information required under these statutes to the council or board. Under the new amendments, fire and police pension boards must now

Pension boards must submit an annual tax levy report each year.

specifically certify and provide in a formal report for tax levy (now often re-

ferred to as the "municipal compliance report") the following information:

- The total assets of the fund and their current market value (40 ILCS 5/3-143(a)(1) and 4-134(a)(1)). Some funds have chosen to list not only the current fiscal year's total assets, but also the preceding fiscal year's total assets, in order to provide a comparison in the report.
- The estimated receipts during the next succeeding fiscal year from deductions from the salaries or wages of police officers/firefighters, and from all other sources (40 ILCS 5/3-143(a))

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review of procedural due process claims arises out of "whether sufficient state-law protections exist, not whether sufficient protections were afforded." Therefore, such a complaint must include a challenge to the fundamental fairness of the state procedures. The Seventh Circuit first reviewed the plaintiff's complaint concerning the post-termination hearing because the adequacy of the pre-termination procedures is dependent upon the extent of the post-termination procedures. The court characterized plaintiff's allegations as a challenge to "random and unauthorized" actions of the state officials in question (i.e. using the Board instead of an independent employee relations committee as the Village Code provided). The state's only obligation under the Due Process Clause with regard to such a claim is to provide sufficient remedies after its occurrence. As such, his claim could only stand if Illinois law provides insufficient remedies for the violation he alleged.

The court found that the Illinois Administrative Review Act would sufficiently provide the type of remedy that the plaintiff was seeking for the post-termination hearing. The plaintiff did not allege that his ability to develop a factual record was inhibited during the post-termination hearing, but rather he was seeking an unbiased independent review of the factual record. The court noted that such review is the essence of the Administrative Review Act. Since the Act provides adequate remedies for the alleged violation of existing procedural requirements, the plaintiff did not sufficiently state a due process claim arising from the post-termination hearing.

With regard to the pre-termination hearing, when adequate post-termination proceedings exist, a pre-termination hearing need only provide an "initial check against mistaken decisions - essentially a determination of whether there are reasonable grounds to believe that

the charges against the employee are true." The court found that because sufficient post-termination protections existed, the truncated pre-termination was justified. Additionally, the court noted that the plaintiff was not entitled to a full "trial-type hearing" in a truncated pre-termination proceeding. Therefore, the due process allegations made by the plaintiff were not valid, and the complaint was properly dismissed. The court noted that it was troubled by the scenario surrounding the plaintiff's termination, but that state law provides adequate remedies for procedural violations.

Although the Seventh Circuit upheld the dismissal of the federal complaint, it should be noted that there is a continuing parallel proceeding in state court. When municipalities conduct administrative hearings on issues such as termination and discipline, it is imperative that they thoroughly review their codes and ordinances and seek legal counsel on the proper procedures to follow. ■

Pension Reform Law

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(2) and 4-134(a)(2)). “Other sources” will include investment earnings and municipal contributions.

- The estimated amount necessary during the next fiscal year to meet the annual actuarial requirements of the pension fund (40 ILCS 5/3-143(a)(3) and 4-134(a)(3)). In addition to the actuarial recommendation from the Division of Insurance (DOI), this report should also list the actuarial required contribution as determined by any private actuary hired by the city, village or fire protection district, or hired by the fund itself.
- The total net income received from investment of assets along with the assumed investment return and actual investment return received by the fund during its most recently completed fiscal year compared to the total net income, assumed investment return, and actual investment return received during the preceding fiscal year (40 ILCS 5/3-143(a)(4) and 4-134(a)(4)). Some funds have chosen to show both the current and preceding fiscal year information in this portion of the report. Note that the assumed investment return should be provided from the DOI’s actuarial report (currently 7%), as well as this assumption from any private actuary report.
- The increase in employer contributions that results from the implementation of P.A. 93-689, which provided for firefighters to combine creditable service and enhanced surviving firefighter spouse pension benefits (40 ILCS 5/4-134(a)(5)). This information is obviously only required in fire-

fighter pension fund reports. However, for any non-home rule municipality, as well as all fire protection districts that are subject to the Property Tax Extension Limitation Law (35 ILCS 200/18-185 *et seq.*), this portion of the required tax levy for the fund will be levied outside the tax cap and should be specifically delineated on the village, city or fire protection district’s levy ordinance.

- The total number of active employees who are financially contributing to the fund. (40 ILCS 5/3-143(a)(5) and 4-134(a)(6))
- The total amount that was disbursed in benefits during the fiscal year, including the number of and total amount disbursed to (i) annuitants in receipt of a regular retirement pension, (ii) recipients being paid a disability pension, and (iii) survivors and children in receipt of benefits (40 ILCS 5/3-143(a)(6) and 4-134(a)(7)). These items should be shown by category as well as in total.
- The funded ratio of the fund (40 ILCS 5/3-143(a)(7) and 4-134(a)(8)). This ratio should be shown as determined by the DOI’s actuary report, as well as by any private actuary report.
- The unfunded liability carried by the fund, along with an actuarial explanation of the unfunded liability (40 ILCS 5/3-143(a)(8) and 4-134(a)(9)). This figure should be shown as determined by the DOI’s actuary report, as well as by any private actuary report. Note that the “actuarial explanation of the unfunded liability” can be a generic explanation of unfunded liability.

- The investment policy of the pension board under the statutory investment restrictions imposed on the fund (40 ILCS 5/3-143(a)(9) and 4-134(a)(10)). A copy of the fund’s most current investment policy should be provided as an attachment to the actual tax levy report.

The fund’s accountant – whether an in-house finance director or an outside accounting firm – should annually prepare this report for the board of trustees at a meeting held after the fund’s audit report has been completed, the annual DOI report submitted, and actuarial reports received. The board should carefully review the report and take official action at its meeting to adopt and certify the report before it is submitted to the city, village or fire protection district.

Under the new amendments, the city, village or fire protection district is authorized to publish the report in a local newspaper or on its website. If published, the city, village or fire protection district must publish the report in its entirety; the publication must include all of the information submitted by the pension board in the tax levy report (40 ILCS 5/3-143(b); 40 ILCS 5/4-134(b)).

In its summary of the “Municipal Public Safety Pension Reforms” published in October 2008, the Illinois Municipal League has strongly encouraged its members to publish these tax levy reports. The IML has also encouraged its members to invite and expect the attendance of the entire pension board at a meeting to discuss the board’s report. Fire and police pension boards should use this opportunity to engage in an educated and meaningful exchange with the city council, the village board or the fire protection district trustees regarding the financial health of the fund, the actuarial assumptions used in determining the appropriate tax levy for the fund, and the employer’s historical contributions to the fund, as well as its future obligations to the fund. ■

Boundary issues

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pal street system; therefore, by provision of the Illinois Highway Code, it was a Township road. (605 ILCS 5/2-103) Furthermore, a former Township highway commissioner indicated his responsibilities included maintenance of the bridge. Ultimately, the court held that the Township owned the bridge, and the Township Highway Commissioner was responsible for its maintenance.

The court examined several challenges to the bridge's designation as part of the Township road system. A review of intergovernmental agreements from November 2001 and October 2004 between the City and Township designated responsibility for plowing and salting the bridge during inclement winter weather to the City, but the agreement did not address the issue of bridge maintenance. The court commented on several references, dating to 1966, that indicated intent to enter into an agreement assigning maintenance responsibility to a municipality other than the Township. However, an agreement was never actually executed. The court also determined that even though municipal residents traveling between the two municipalities used the bridge frequently, Section 2-104

of the Highway Code still did not render it a part of either municipal street system. (605 ILCS 5/2-104)

Second, the court addressed the question of the Township's involvement in the case given that the Township Highway Commissioner was responsible for the repair and improvement of roads under the Township's authority. (605

80-15 and 80-60 of the Townships Code. (60 ILCS 1/80-15 and 80-60)

Third, the court noted that municipal disconnections and annexations are properly challenged via *quo warranto*, a legal proceeding in which the authority for an action is contested. In *Village of Montgomery*, the court noted that the authority for the City's 1961 disconnection was not disputed during the forty-plus-year intervening period, and thus the Township was precluded from raising such a challenge at this time.

The *Village of Montgomery* decision highlights the importance of intergovernmental agreements among local governments. Government officials, officers, and staffs must exercise proper diligence and care when contemplating and entering into intergovernmental agreements. Failure to finalize and memorialize intergovernmental agreements and related documents can result in costly financial expenditures. Note that the Illinois Supreme Court has granted a petition for an appeal of this case and will review it during its May 2009 term. ■

***Failure to memorialize
an intergovernmental
agreement can
prove costly.***

ILCS 5/6-201.8) Moreover, the Township (1) owned the roads within its road system; (2) approved the budget submitted by the Township Highway Commissioner to operate the Township's roads and bridges; and (3) audited the Township Highway Commissioner's accounts. Based on the above facts, the court held that the Township was properly involved in the action pursuant to Sections

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