



Review of Significant Recent Case Law Affecting Illinois Fire Protection Districts

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The following are highlights of significant case law decisions affecting Illinois Fire Protection Districts from the last year. Topics addressed include decisions on PTELL, the Tort Immunity Act, civil rights, and pension issues, among other topics. This review addresses the more significant decisions that might impact the fire service.

OPEN MEETINGS ACT

A citizen who was denied the right to inspect original copies of the audiotapes from two city council meetings brought action against the city alleging violation of the Open Meetings Act. The citizen made several written requests requesting the city allow him to inspect and listen to the audiotapes. The city responded that the audiotapes were available for inspection, but the city had to maintain possession of the originals at all times in order to preserve its original public records. The city further stated that it did not have the facilities for the public to listen to audiotapes, but the citizen could obtain copies of the tapes for a fee. The citizen repeated his request to the city to review the original copies, but received a similar letter explaining that his only option would be to purchase copies of the audiotapes for a fee.

The city claimed it was not required to allow inspection of the original tapes because nothing in the Open Meetings Act requires that an original public record be provided to a requestor and nothing in the Act requires a public body to provide the means or facilities to a requestor for the purpose of listening to an original or a copy of an audiotape. The court disagreed, holding that the term "public record" as used in the Open Meetings Act necessarily refers to a public body's original record. Accordingly, in order to comply with the Act, the city must make the original audiotapes available for inspection. Further, the court noted that the city's lack of facilities for the public to listen to audiotapes is not a valid basis upon which to deny a request to inspect a tape-recorded public record, because it is not an exception provided by the Act.

Lastly, the court held the Act does not allow for the charging of fees associated with the inspection of public record. The Act does provide that a public body may charge a fee to reimburse its actual cost for reproducing and certifying public records, but since the citizen in the instant case merely wanted to inspect the original copies, charging a fee would not be proper. ***Despain v. City of Collinsville*, ___ Ill.App.3d ___, 888 N.E.2d 163 (5th Dist. 2008)**

TAX LEVY

The Will County Board adopted a property tax levy pursuant to the County Shelter Care and Detention Home Act. Prior to enactment of the levy, it was never submitted for voter approval by referendum to the voters of Will County. Plaintiff challenged the levy under the Property Tax Extension Limitation Law ("PTELL"), which mandates that all "new rates" be approved by voters before being enacted. Since the levy created a new tax, meaning a tax imposed for the first time, Plaintiff argued that it was a new rate pursuant to PTELL and therefore required voter approval before its enactment. The Board countered that the new levy was not a new rate for the purposes of PTELL because a new rate is defined as taxes newly authorized by statutes enacted after the effective date of PTELL, which was January 1, 1994.

The Third District Appellate Court agreed with the Board and held the property tax levy was not in violation of PTELL. The Court reasoned that "new rate" under the statute means only those new taxes newly authorized by statutes enacted after the effective date of PTELL. Due to the fact the County Shelter Care and Detention Act was enacted prior to the effective date of

PTELL, the court ruled that the Board's levy was not required to be submitted for voter approval by referendum pursuant to PTELL. Note that the Illinois Supreme Court has indicated that it will review this decision. ***Acme Markets, Inc. v. Callanan*, 378 Ill.App.3d 676 (3d Dist. 2008)**

Plaintiff filed a tax objection which alleged that the District had levied an unnecessary tax for general road and bridge purposes that had improperly accumulated funds. In his affidavit, the Highway Commissioner ("Commissioner") stated that he is not an economist or an accountant, but he prepares the annual tax levy using his best effort to estimate the amount of taxes that will be necessary. When asked how he arrives at the figure, he explained that the estimate of expenditures for the fiscal year is usually based on the previous year's experience or what he knows the needs will be for the new fiscal year. However, when asked if any documents existed that would show the calculated figure of the approximate estimated expenditures, he explained that there were none because it was his own judgment call as to what the needs of the District would be. Further, the Commissioner admitted that the supporting documentation concerning the levy did not exist, because it was destroyed after the levy was adopted.

The court held that justification for a tax levy is not a matter of law, but a question of fact. Taxing bodies have broad discretion in estimating the amounts to levy, but the law is clear that an unnecessary accumulation of funds is against the policy of the law. Accordingly, it is up to the

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District to offer some type of proof that the accumulation is justified. However, the Commissioner offered nothing more than his own opinion that he tried his best. The court held that this evidence does not come close to the level necessary to establish that the accumulation was justified. The Court remanded the case for further proceedings so it could be determined whether there was any additional evidence that would support the District's contention that the accumulated funds were justified. ***Allegis Realty Investors v. Novak*, 379 Ill.App.3d 636, 885 N.E.2d 325 (2d Dist. 2008).**

DISCIPLINE AND DISCHARGE

Plaintiff worked as a registered nurse at Proctor Hospital ("Proctor"). She was said to be a valuable employee who consistently received positive evaluations. Both Plaintiff and her husband were covered under Proctor's health insurance plan. Proctor was a partially self-insured entity which would pay for members' covered medical costs up to \$250,000.00 per year. Plaintiff's husband became ill in 2003. He was diagnosed with cancer and underwent several costly medical procedures. In September of 2004, a Proctor representative approached Plaintiff about her husband's unusually high medical expenses and explained that the expenses were under review by a committee. In February of 2005, the representative again approached Plaintiff about the high medical expenses. In May of 2005, Proctor's clinical managers had a meeting in which they were informed that Proctor faced financial troubles and would need to find "creative" ways to cut costs. In August of 2005, Proctor fired Plaintiff and designated her as ineligible to be rehired in the future. Proctor claimed that she was fired for insubordination. No explanation was provided for why she was ineligible to be rehired.

Plaintiff made several claims against Proctor alleging that she was unfairly discriminated against on account of her husband's medical status. One of these claims was for association discrimination. Under the Americans with Disabilities Act ("ADA"), an employer is prohibited from discriminating against an employee as a result of the known disability of an individual with whom the employee is known to have a relationship or association. The court has outlined three categories into which victims of association discrimination fall: (1) expense; (2) disability by association; and (3) distraction. The court concluded that a plaintiff

who is fired because her spouse has a disability that is costly to the employer is within the intended scope of the expense category under the association discrimination section of the ADA. So, given the facts of the case, the court concluded that enough evidence existed for a reasonable jury to conclude that Plaintiff was a victim of association discrimination.

Also, Plaintiff brought a claim of ERISA retaliation. Under the ERISA statute, an employer may not fire a participant of an employee benefit plan for exercising any right to which he or she is entitled under the provisions of the plan. The court made it clear that if Proctor had a legitimate, nondiscriminatory reason for firing Plaintiff, then she would be out of luck, because she would be unable to show retaliation as is required by the ERISA statute. However, Proctor presented no evidence of Plaintiff's insubordination. Rather, the facts indicate that Plaintiff was a very good employee. So, given the facts of the case and the suspicious timing of Plaintiff's termination, the court concluded that enough evidence existed for a reasonable jury to conclude that Plaintiff was a victim of ERISA retaliation.

***Dewitt v. Proctor Hospital*, 517 E3d 944 (7th Cir. 2008)**

Plaintiff was employed as the Chief of Police of East Galesburg, Illinois, but he had no employment contract with the Village. In spite of a local ordinance which provided that the Chief of Police could only be removed from office by the President of the Village with the advice of the Board of Trustees, the Board voted to remove Plaintiff from office without the President's consent. Plaintiff sued the Village under 42 U.S.C. §1983 claiming a violation of his due process rights under the Fourteenth Amendment to the US Constitution. The Village moved for dismissal arguing that Plaintiff has no constitutionally protected property right in continued employment as the Police Chief of the Village.

The court held that in order for Plaintiff to have a constitutionally protected property right in continued employment, he must have a legitimate claim of entitlement to continue in the job. This type of property right is created by an independent source, such as a contract or state law. However, under Illinois law, public employees do not have property rights in employment which trigger due-process protections. Their employment is considered "at will", meaning that it can be terminated at any time. Accordingly, the court dismissed Plaintiff's due process claim. Plaintiff cited an Illinois statute which sets out procedures for removal of a police chief and claimed that said

statute creates a property right, but the court held that procedural guarantees do not establish a property interest. The court reasoned that in order to establish a property interest, a statute must provide some substantive criteria limiting the state's discretion, such as the requirement that an employee could only be fired for "just cause". The court felt that a statute which merely provides procedures to be followed for an employee's termination does not qualify as a substantive criterion limiting the state's discretion. So, the court concluded that even though Plaintiff's termination was contrary to the local ordinance, it does not follow that there has been a violation of due process. ***Myler v. Village of East Galesburg*, 512 E3d 896 (7th Cir. 2007)**

...under said Act an employee is entitled to up to twelve weeks of unpaid leave per year for absence due to a "Serious Health Condition" that renders the employee unable to perform the functions of his job.

Plaintiff was a fifteen-year employee for the Interstate Brands Corporation ("IBC"). Plaintiff was an alcoholic and suffered a relapse on the evening of July 28th. When Plaintiff's wife discovered he had relapsed on July 29th, she called the hospital to see if she could bring him in for treatment. After dealing with the insurance paperwork, Plaintiff called the hospital again on August 1st but received no response. The following day, he made an appointment to be admitted to the hospital, and on August 4th he was admitted for treatment. When Plaintiff returned to work on August 15th, he was informed that he was being terminated for missing work on July 31st, August 2nd, and August 3rd. Plaintiff brought a claim under the Family and Medical Leave Act ("FMLA") because under said Act an employee is entitled to up to twelve weeks of unpaid leave per year for absence due to a "Serious Health Condition" that renders the employee unable to perform the functions of his job. IBC countered that FMLA did not cover Plaintiff's absences on July 31st, August 2nd and 3rd because the FMLA mandates that a Serious Health Condition must involve either (1) inpatient care in a hospital, hospice, or residential medical facility; or (2) continuing treatment by a healthcare provider. So, the IBC reasoned that due to the fact Plaintiff was not actually receiving any treatment

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on the aforementioned dates, he was not entitled to miss work pursuant to the FMLA.

The court ruled for IBC, holding that when an employee alleges a violation of the FMLA, the employee must establish, by a preponderance of the evidence, an entitlement to the disputed leave. Due to the fact Plaintiff could not produce any evidence that he was receiving treatment on the dates in question, he could not establish he was entitled to miss work on those dates and therefore his termination was not in violation of the FMLA. Plaintiff argued that he was receiving treatment for his alcoholism on the dates in question because he was attempting to check into a hospital. He even produced a signed affidavit from his physician stating that the first step in recovery from alcoholism is seeking professional help. The court rejected this argument, holding that treatment for Plaintiff's alcoholism did not actually begin until he entered the hospital. So, Plaintiff's termination was not in violation of the FMLA. ***Darst v. Interstate Brands Corporation*, 512 E3d 903 (7th Cir. 2008)**

TORT IMMUNITY ACT

Plaintiffs were riding in a vehicle when it was struck by an ambulance being driven by a City of Evanston firefighter responding to an emergency situation. The ambulance was proceeding southbound on Sherman Avenue at what the ambulance driver claimed was at or near the posted speed limit. The ambulance came to a stop sign at the intersection of Sherman Avenue and Oakton Street. The westbound and eastbound traffic on Oakton Street did not have stop signs. With its siren activated, the ambulance proceeded through the intersection without stopping pursuant to 625 ILCS 5/11-205, which states that the driver of an emergency vehicle may proceed past a stop sign or red light after slowing. Plaintiffs were traveling westbound on Oakton Street through the intersection when the ambulance collided with their automobile. The ambulance driver claimed he did not see Plaintiffs' car due to a row of trees which obstructed his view. The Plaintiffs claim they did not see the ambulance or hear any sirens. Plaintiffs also asserted that the ambulance was going nearly twice as fast as the ambulance driver claimed.

The plaintiffs sued the firefighter as well as the City of Evanston for negligence. Pursuant to the Tort Immunity Act, "except for willful or wanton conduct, neither a local public entity, nor a public employee acting within the scope of his

employment, is liable for an injury caused by the negligent operation of a motor vehicle or firefighting rescue equipment, when responding to an emergency call". So, the court was left to determine whether the ambulance driver's actions under these facts constituted willful and wanton conduct. The court held that in order to show willful and wanton conduct, the act must show deliberate intention to cause harm, or if not intentional, show an utter indifference to or conscious disregard for the safety of others or their property. The court held that this is ultimately a question of fact, and given the facts of the case, the court determined that the ambulance driver did not show any willful or wanton conduct. Therefore, the court dismissed the plaintiffs' complaint.

The plaintiffs attempted to introduce photographs of the damage to their car after the accident as proof that the speed of the ambulance must have been much higher than the posted speed limit. However, the court refused to admit this evidence, because no expert testimony was offered with the photographs to support the plaintiffs' contention. With no expert to explain that the photographs indicate that the ambulance driver must have been going extremely fast considering the damage to plaintiffs' car, the photographs could not be used to prove that the ambulance driver was acting with an utter indifference for the safety of others. The plaintiffs also argued that the ambulance driver's conduct was willful and wanton due to his alleged failure to activate the siren. The court held that even if the ambulance driver did not activate the siren, the failure to activate emergency equipment does not constitute willful and wanton conduct.

Lastly, plaintiffs argued that the ambulance drivers' conduct was willful and wanton because the Evanston fire department has a policy which requires an emergency driver to slow down or stop at traffic signs during an emergency situation. The court disregarded this argument as well, holding that the violation of a self-imposed rule or internal guideline does not normally impose a legal duty. So, a violation of the Evanston fire department policy would not be evidence of willful and wanton conduct. ***Williams v. City of Evanston*, 378 Ill.App.3d 590 (1st Dist. 2007)**

City of Park Ridge paramedics responded to a call for a "nonresponsive" patient. The paramedics allegedly did nothing to assist the patient, who died the next day. After determining the paramedics had failed to evaluate, assess, examine, diagnose, treat or document the

patient's condition, the trial court dismissed the case based on the immunity provided by the Tort Immunity Act, and the plaintiff appealed.

In *Abruzzo v. City of Park Ridge*, 374 Ill.App.3d 743 (1st Dist. 2007), the Illinois First District Court of Appeals determined what type of immunity protects EMS providers from civil lawsuits. At issue were Sections 6-105 and 6-106 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 *et seq.*) and Section 3.150(a) of the Emergency Medical Services Systems Act (210 ILCS 50/1 *et seq.*). The Tort Immunity Act protects local government and its employees from suit if they fail to or inadequately examine, diagnose, or treat any person, as long as that failure occurs within the scope of employment. While the EMS Systems Act also

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protects EMS providers from lawsuits, it contains an exception for willful and wanton misconduct. It was this conflict between the absolute immunity of the Tort Immunity Act and the limited immunity of the EMS Systems Act that the court was asked to resolve.

On appeal, the plaintiff posed a two-point argument to the court. It first argued the EMS Systems Act, rather than the Tort Immunity Act, was the correct immunity for the court to apply because it specifically addresses EMS providers. It then argued the defendants acted willfully and wantonly so that the EMS System Act's immunity did not protect them. If the EMS Systems Act did apply instead of the Tort Immunity Act, and the responding EMS providers were in fact guilty of willful and wanton conduct, they would not have been immune from suit.

The court disagreed with the plaintiff, instead affirming the trial court's use of the Tort Immunity Act instead of the EMS Systems Act. The court noted that the defendants had failed to examine, adequately examine, diagnose or adequately diagnose the patient, and as a result the Tort Immunity Act applied. The categorization of the patient as "unresponsive" in the 911 call did not rise to the level of a diagnosis, but was merely a

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symptom. ***Abruzzo v. City of Park Ridge*, 374 Ill.App.3d 743 (1st Dist. 2007)**

Plaintiff suffered an allergic reaction and required immediate medical attention. Three minutes after arriving at the immediate-care center, a team of five paramedics employed by the Algonquin/Lake in the Hills Fire Protection District began to administer care. "Standing Medical Orders" ("SMOs") issued pursuant to state health regulations authorize a physician at the scene of an emergency to take control. Pursuant to these SMOs, a physician who was at the scene told the paramedics that the Plaintiff needed to be intubated immediately. Over the course of the next couple minutes, the Plaintiff's jaw locked shut. With some difficulty, the paramedics attempted to intubate her. However, the tube became dislodged and the paramedics were forced to insert the tube for a second time. When the Plaintiff finally arrived at the hospital, the Emergency Room staff quickly discovered that the tube had been placed in the Plaintiff's esophagus rather than her trachea. Plaintiff suffered irreversible brain damage and died two and a half years later.

Plaintiff's estate sued the paramedics and the Fire Protection District. Pursuant to the Illinois Emergency Medical Services Act, a licensed emergency medical care provider, such as the paramedics, shall not be liable for acts or omissions conducted in the normal course of their activities unless the acts or omissions constitute willful and wanton conduct. Plaintiff argued that the paramedics' conduct was willful and wanton because they failed to detect that the final intubation had failed, and they disregarded the SMO which authorized the physician to take control of the scene. The court disagreed with Plaintiff on both counts and dismissed the claim. The court held that there are procedures for checking whether an endotracheal tube is in the right place, and the paramedics' failure to detect the misplacement could be negligence. However, the court reasoned that given the pressure of time under which the paramedics were working, the failure to have made a written notation of having checked the correct placement of the tube is "too thin" to justify an inference of willful and wanton misconduct. Further, the court dismissed the notion that the paramedics' failure to follow the SMO was willful and wanton. The court reasoned that mandating that SMOs be followed in all situations would send a signal to paramedics that they would have a safe harbor from lawsuits if they simply comply with the SMOs. The court reasoned that this would be

poor public policy, so the claim was dismissed. ***Fagocki v. Algonquin/Lake in the Hills Fire Protection District*, 496 E3d 623 (7th Cir. 2007)**

WORKER'S COMPENSATION

Plaintiff was a firefighter employed by the Kankakee Fire Department. He was in the line of duty when he injured his back and shoulder lifting an elderly patient. Plaintiff tried to treat the injuries through nonsurgical measures over the course of the next couple months, but his pain persisted. Eventually, it was determined that surgery would be his best option for a full recovery. However, the surgery had to be repeatedly postponed because worker's compensation refused to pay. Finally, approximately nine months after the injury, worker's compensation agreed to pay and the surgery was performed. Unfortunately, Plaintiff's condition failed to improve after the surgery. He attempted physical therapy but could not endure the procedures on account of the pain. Ultimately, Plaintiff discontinued his physical therapy and filed for disability with the Pension Board ("Board"). The Board denied Plaintiff's claim, arguing that there was ample evidence showing that applicant was not disabled. Further, the Board contended that even if Plaintiff was disabled, he was not entitled to disability pay because he failed to take reasonable steps to remedy his condition as is required by the Worker's Compensation Act. Plaintiff appealed the Board's decision to the court, and the court struck down the Board's ruling and instructed it to enter an order granting Plaintiff's disability application.

There were several reasons the Board cited for its contention that Plaintiff was not disabled. One of these reasons was that Plaintiff was lying about the severity of his condition. The Board cited the fact that Plaintiff waited several months before he considered surgery to treat his injuries. The court held that this was not a valid reason for accusing the Plaintiff of lying about the severity of his condition, because the record indicates he tried several nonsurgical measures to treat his injuries before it was determined that surgery was his best option. Further, the record also indicates there was a genuine issue of whether worker's compensation would pay for the procedure which also caused a significant delay. So, the court held this was not a valid reason for denying Plaintiff's disability benefits.

Another reason the Board gave for denying Plaintiff's disability benefits was the contention that the testimony of Plaintiff's doctors was not

trustworthy because Plaintiff allegedly lied to them about his symptoms when they were forming their opinions. The court struck this contention down as well, reasoning that when it comes to treating physicians, statements describing medical history, symptoms, pain and sensations are admissible because there is an assumption that patients tell their doctors the truth when they are seeking treatment. In the instant case, the statements Plaintiff gave his doctors were made for the purposes of medical diagnosis and treatment.

The Court held that the statute indicates the decision of whether the claimant is disabled is to be made by the board, rather than any individual examining physician.

So, the court held this was also not a valid reason for denying Plaintiff's disability benefits.

Next, the court addressed the issue of whether Plaintiff was not entitled to disability pay because he failed to take reasonable steps to remedy his condition as required by the Worker's Compensation Act ("the Act"). Under the Act, if an employee fails to submit to such medical treatment as is reasonably necessary to promote his recovery, the Board may in its discretion suspend the compensation of such employee. The Board argued that Plaintiff failed to submit to physical therapy even though it was necessary to promote his recovery, so the Board was entitled to deny his disability coverage. The court struck down this logic as well, holding that there is no definite statement from any of Plaintiff's doctors that his failure to continue with physical therapy was the cause of his disability. Rather, some evidence existed that physical therapy would not help and Plaintiff was unlikely to improve even with rehabilitation. So, this was not a valid reason for the Board to deny Plaintiff's disability benefits. ***Rozsak v. Kankakee Firefighters' Pension Board*, 376 Ill.App.3d 130 (3d Dist. 2007)**

Plaintiff was a police officer for the City of North Chicago. He was working full duty as a patrolman when he was injured while attempting to move a handcuffed prisoner. No doctor would release Plaintiff to go back to work as a patrolman, and the City informed Plaintiff that it did not have a permanent sedentary position available. Plaintiff was told he had two options:

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