

COMMISSIONERS' CORNER



Inability to Perform

Editor's Note: The Commissioner's Corner is a column of *The Fire Call* that addresses issues relevant to Board of Fire Commissioners and will be authored by attorneys and others with legal experience in this area.

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One of the most difficult tasks faced by a Board of Fire Commissioners is the decision whether to discharge a sworn firefighter. Substantial time, effort and resources are invested in the hiring and training of quality personnel, and discharge is an unwelcome outcome. An additional question is raised when the discharge of a firefighter relates not to intentional misconduct, or even negligent job performance, but rather to a medical inability to complete the functions of the job. Despite the natural sympathy which may be involved, there are circumstances in which the extent of a firefighter's medical condition may represent a "substantial shortcoming" making it impossible for the firefighter to perform the essential functions of the job.

Such discharge proceedings are fraught with peril, particularly since other statutes, regulations and rules (ADA, Pension Code, and so on) may come into play. Also, in instances where the disability relates to a work related injury or condition, the discharge of a firefighter may carry the risk of litigation for retaliatory discharge. While discharge proceedings are typically magnets for litigation, this can be accentuated when the cause for discharge relates to a medical issue.

Still, the courts have recognized that circumstances exist in which a Board of Commissioners may be required to take action to remove a firefighter who has become

medically unable to complete the essential functions of the job. In a recent case, the Second District Court of Appeals in *Dowrick vs. Village of Downers Grove*, 362 Ill.App.3d 512, 840 N.E.2d 785 (2005) considered such a discharge decision. The firefighter in question sustained neck and back injuries while assisting an ambulance call. The employee was released to return to full time work, but instead was assigned to a light duty position. The firefighter then filed a petition with the Pension Board seeking a duty disability pension. However, the Pension Board, based on the determination of an independent position, found that the firefighter's physical condition did not render him permanently disabled for service with the fire department, and denied the duty disability pension petition.

Subsequently, the Board of Commissioners began proceedings to determine whether the firefighter should be discharged. Evidence was presented to the Board of Commissioners that the firefighter failed to return to full duty, failed to complete the necessary training activities, and experienced difficulty while attempting to assist on a medical call. The employee indicated that he could not guarantee performance of his duties without putting his fellow firefighters, other citizens, or himself at risk. The Board of Commissioners ultimately found that the firefighter was unwilling and unfit to perform the job of a full time firefighter, and discharged the firefighter for cause.

The Appellate Court decision initially addressed a question of whether it was inherently contradictory for the Board of Commissioners to have determined that the firefighter was incapable of performing the job, after the Pension Board had made a determination that the firefighter was not disabled. The Court, however, held that the issues before the Pension Board, and the issues before the Board of Fire Commissioners, were not identical, and therefore the decision of the Pension Board was not binding on the Board of Fire Commissioners.

The Court then went on to discuss whether the Board of Fire Commissioners had properly exercised its authority in discharging the firefighter. The Court identified "substantial shortcoming" criteria as the applicable standard. The Court noted that the Board found the firefighter to be unwilling and unable to perform the duties of the firefighter. The Court held that the finding was not against the manifest weight of the evidence. In so doing, the Court noted the potential danger in the continued employment of a firefighter who admitted an inability to perform the ordinary duties of a firefighter.

While the courts have therefore recognized the right to discharge for medical

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inability to perform, a further trend has developed in the case law which has restrained Boards of Fire Commissioners from discharging employees when the medical disability in question relates to a psychological, rather than physical, condition. Two recent cases demonstrate this particular issue.

In *Lynch vs. City of Waukegan*, 362 Ill. App.3d 1078, 845 N.E.2d 911 (2006) the court considered the discharge of a firefighter who had become upset and agitated during a training session to the extent that his fellow firefighters were required to put him into an ambulance. He was subsequently diagnosed with panic disorder, and was cleared to return to restricted duty work. Further testimony indicated that he subsequently required another firefighter to enter a fire scene despite his protests of insufficient water supply for his hose. The Court was asked to consider whether the Board of Fire Commissioners had properly determined that these issues constituted a substantial shortcoming on the part of the firefighter.

Similar to the *Dowrick* Court, the Appellate Court initially considered the impact of the decision of the Pension Board to grant the firefighter a duty disability pension. However, in this case, the Appellate Court found the Pension Board's decision to be significant, based upon the Supreme Court's

prior decision in *Walsh vs. Board of Fire and Police Commissioners*, 96 Ill.2d 101, 449 N.E.2d 115 (1993). The Walsh Court set forth the general precedent that it is "arbitrary and unreasonable" to initially grant a duty disability pension based on psychiatric issues, and subsequently discharge a firefighter, taking away his pension, based on the same condition. Therefore, in *Lynch*, the Court noted that the Pension Board had already granted a duty disability pension based upon the Plaintiff's cognitive disorder, and that the firefighter could not be discharged for misconduct that is "substantially related to" the psychiatric condition forming the basis of the pension award.

A similar result was rendered by the Second District Appellate Court in *Hermesdorf vs. Wu*, 372 Ill.App. 842, 867 N.E.2d 34 (2007). In that case, the Board of Fire Commissioners discharged a firefighter from the department after he allegedly berated and physically assaulted an in-custody female patient during a medical response. After the Board voted unanimously following a full hearing to discharge the Plaintiff for cause, the firefighter obtained a non-duty disability pension from the City's firefighter pension fund. Therefore, on review, the Court noted that the firefighter had been granted a pension for a condition substantially similar to the reasons for the discharge. The Court rendered a somewhat broader interpretation of *Walsh*, stating that any discharge for cause

is inappropriate where an employee's alleged misconduct is substantially related to or caused by a psychiatric condition. Therefore, taking the *Hermesdorf* decision at face value, a board must consider whether it is appropriate, in any instance, to discharge a firefighter for cause where the failure or misconduct relates to a psychiatric condition.

As a matter of practicality, this would seem to open up a Pandora's Box with regard to discharge proceedings. One can envision firefighters charged with specific instances of gross misconduct claiming a psychiatric or psychological condition as the explanation for the conduct. This would result in a broadening of discharge proceedings from simply a determination of a "substantial shortcoming" to a potential battle of medical experts to determine whether the alleged instance of misconduct is psychologically based.

Overall, the recent developments in case law seem to have opened up a significant loophole to the previously stated determination that medical disability may be a good faith cause for discharge. What initially developed as a question of the interplay between Pension Board decisions and Fire Commission decisions has led to case law prohibiting discharge of an unqualified firefighter for reasons related to a psychiatric condition. Accordingly, barring further clarification from the courts, Boards of Commissioners should proceed with care. ■

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