

**ILLINOIS ASSOCIATION OF
FIRE PROTECTION DISTRICTS
2020 CONTINUING EDUCATION TRAINING**

**HIGH TIMES: CANNABIS LEGALIZATION,
HOT-OFF-THE-PRESS PAC OPINIONS,
-AND- NEW CASELAW**

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1

CANNABIS LEGALIZATION



2

Background: Marijuana

- Marijuana is the dried flowers and leaves of the cannabis plant.
- It contains mind-altering compounds like tetrahydrocannabinol (“THC”).
 - What causes people to feel “high.”
- Also contains cannabidiol (“CBD”).
 - “Relaxing but not intoxicating.”
 - Not mind-altering, actually antagonistic to THC’s effects.
- Routinely smoked or eaten.

3

Side Effects

- ▶ Having difficulty thinking and problem-solving;
- ▶ Having problems with memory;
- ▶ Learning and maintaining attention and demonstrating impaired coordination; and
- ▶ Smoking risks:
 - ▶ Bronchitis, cough, etc.

4

The Problem with Edibles

- ▶ Edibles desired by individuals who do not want to smoke marijuana.
- ▶ Edibles take longer to digest and longer to produce an effect.
- ▶ People may consume more to feel the effects faster and harder.
- ▶ High doses yields:
 - ▶ Anxiety;
 - ▶ Paranoia; and
 - ▶ In rare cases, psychotic reactions (e.g., hallucinations, incoherent speech).

5

Background: Medical Marijuana

- Since 2014, marijuana has been legal for medicinal purposes.
- Limited impact on the fire service:
 - "Active duty" firefighters or police officers cannot use it.
 - Also, anyone who performs their job while under the influence of medical marijuana could be subjected to malpractice / negligence lawsuits.
- ▶ Note: Single role paramedics are able to use medical marijuana.

6

Background: Medical Marijuana

- ▶ Ordinarily, employers cannot refuse to employ an individual simply for using medical marijuana.
- ▶ But, employers are **not** required to allow cannabis in the workplace.

7

The Cannabis Regulation and Tax Act

- Illinois is the first state to legalize recreational cannabis via legislation (versus voter initiative as enacted in Colorado, Washington State and California).
- Not just cannabis legalization, but also expungement of criminal convictions for low-level marijuana offenses.
 - Governor Pritzker pardoned 11,000 people with weed convictions on December 31, 2019.

8

What's Changed?

- **Recreational** marijuana use and personal cultivation for those 21 years and older is legal as of January 1, 2020.
- Illinois citizens can possess:
 - 30 grams of cannabis flower
 - 500 milligrams of "edibles"
- Can only be purchased at licensed dispensaries.
 - Currently, they only accept cash.

9

What Hasn't Changed:

- It's still illegal to use cannabis and then undertaking a task when doing so would constitute professional negligence/malpractice.
- It is still illegal to **possess** cannabis:
 - In a private vehicle – "open container."
 - On school grounds / buses (except for qualifying medical use)

10

What Hasn't Changed:

- It is still illegal to use cannabis:
 - In *any* motor vehicle;
 - Anywhere close to anyone under 21 (unless they are receiving medical marijuana);
 - When smoked, in any place where smoking is otherwise prohibited under the Smoke Free Illinois Act (within 15 feet of any work entrance).
 - In any "public place."

11

What Hasn't Changed:

- It is still illegal to use cannabis:
 - In any "public place."
 - Defined as any place where a person could reasonably be expected to be observed by others," including "all parts of buildings owned in whole or in part, or leased, by the State or a unit of local government."
 - CDL holders must abide by federal drug testing requirements.

12

Employer Protections

- Cannabis Act Preamble:
 - Declares that “employee workplace safety shall not be diminished and employer workplace policies shall be interpreted **broadly** to protect employee safety.” 410 ILCS 705/1-5(e).
 - The Act has been reported to provide the most extensive workplace protections for employers of **any** marijuana legalization effort in the country.

13

The Drug Free Workplace Act

- Requires all federal grantees to agree they will provide drug-free workplaces as a precondition of receiving a contract or grant from a Federal agency.
- Does not require drug testing.
- Does not require an employer to fire an employee who tests positive.

14

Employer Protections

- ▶ Employers may adopt reasonable zero tolerance or drug free workplace policies, or employment policies concerning drug testing, smoking, consumption, storage, or use of cannabis in the workplace or while on call.
 - Must be applied in a nondiscriminatory manner.

15

Employer Protections

- ▶ Employers do not need to permit an employee to be under the influence of or use cannabis in the workplace.
- ▶ An employer can discipline or terminate an employee for violating a valid drug policy.
- ▶ Lawsuit immunity for employers who, upon generating a good faith belief that an employee is impaired by marijuana, terminate him or her.

16

Employer Protections

- ▶ A “good faith belief”:
 - ▶ If an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance.
- ▶ May include:
 - ▶ Symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery.
 - ▶ Disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property.

17

Employer Protections

- ▶ Employers do not have to undertake any action that would cause them to lose federal funding.
- ▶ If a federal grant depends on more onerous requirements imposed by the feds, then the Illinois law won't stand in the way.

18

Fire-Specific Protections

- ▶ Firefighters / police officers cannot use or be under the influence of cannabis while on duty or on call.
- ▶ Public safety employers **can** ban the off-duty use, possession, sale, purchase, or delivery of cannabis by firefighters / police officers.
 - ▶ Wasn't always the case – new addition as of November 2019.

19

Fire-Specific Protections

- ▶ **One qualification:** Firefighters can't be disciplined for the lawful possession / consumption of the firefighter's family members.

20

Collective Bargaining Considerations

► No Union?

- Fire District can implement cannabis changes under whatever terms it likes.

► Union?

- Cannabis-related changes to a drug and alcohol policy are mandatory topics of bargaining.
- Changes from status quo must be bargained.

21

Collective Bargaining Considerations

► **Trailer Bill:** Collective Bargaining Agreements are supreme.

- "To the extent that this Section conflicts with any applicable collective bargaining agreement, the provisions of the collective bargaining agreement shall prevail."
- "Further, nothing in this Act shall be construed to limit in any way the right to collectively bargain over the subject matters contained in this Act."

22

What Are Unions Asking For?

► **It depends on the Union**

- Some: Zero tolerance, banned at all times.
- Others: Should only be allowed off-duty, often agreeable to prohibiting consumption within 24 hours of one shift.
- Still others: Should be allowed off-duty, no prohibitions on use beforehand.

23

What Are Unions Asking For?

► **AFFI Stock Proposal:**

- If an employee is suspected of being under the influence, they get sent to a doctor.
- Doctor performs a blood test screening for cannabis.
- A positive test is defined as ___ ng/ ml of THC.
- Doctor examines all alternate medical explanations, employee's medical history, other relevant biomedical factors.
- Doctor opines on whether the individual was high at work.
- No action can be taken without a finding that the employee was impaired by the doctor.
- If there's a negative finding, then test results/communications are destroyed.

24

What Are Unions Asking For?

► **The positive aspects:**

- This is not very different from how other drug tests are performed and handled.
- Blood test presumptive positives can be set contractually.
- The grievance procedure takes care of the requirement that an employee has a route to challenge an employer's finding of impairment.

25

What You Should Insist On

- **A ban on use/possession of cannabis at work or while “on call.”**
- **A ban on use/possession of cannabis within 24 hours of a shift.**
- **A presumptive positive of 5 ng/ml of THC.**
 - This tracks the state's DUI threshold. If the firefighter can't drive, they can't come into work.
- **Mandatory on-duty drug exposure reporting**
 - If an employee is exposed to cannabis while on-duty, they should be required to report it as with any other drug exposure.

26

What About 12-Hour Bans?

► Not recommended.

- ▶ The science suggests that cannabis impairment may persist for up to 24-hours after ingestion.
- ▶ This is especially true if the individual has ingested “edibles” rather than smoking them.

27

Where to Draw the Line?

► Some tough questions that need answering before imposing a total ban on off-duty cannabis:

- ▶ How do you actually enforce a policy that prohibits off-duty use of cannabis by firefighters?
- ▶ If a volunteer firefighter's regular, day-to-day job is cultivating or farming the plant, is that now a terminable offense?
- ▶ If a firefighter is seen leaving a dispensary, is that enough to presume the firefighter is engaged in off duty use or possession or at least enough to subject the firefighter to a disciplinary investigation?
- ▶ Would fire districts rely on word of mouth to prove off-duty possession resulting in termination?

28

Drug Testing after Legalization

- ▶ **Drug Testing Still OK:**

- ▶ The Cannabis Act allows Districts to drug test its employees and applicants.

- ▶ OK to withdraw a job offer due to a failure of a drug test.

- ▶ **ADA Problem?** No. Marijuana is still illegal under federal law.

- ▶ **Illinois Human Rights Act Problem?** Maybe.

- ▶ Drug screening may be more trouble than its worth in some cases.

29

What's the PAC Been Up To?



30

City of Rushville: Public Comment

► **Facts:**

- ▶ A non-resident showed up to the City's public meeting and attempted to speak.
- ▶ Mayor stopped her because "you have no standing to be here, you don't live in this town, you don't vote in this town and you have no reason to be here."

► **PAC:**

- ▶ A person's right to comment at an open meeting is not contingent upon where he or she resides.
- ▶ A public body cannot abridge this right via rulemaking.

31

Pinckneyville School District:

► **Facts:**

- ▶ At a public meeting, a school board voted on "Resolution 2019-1 authorizing a notice to remedy" but otherwise gave no public details on what that meant.
- ▶ The board also did not divulge to whom the "notice to remedy" was directed.
- ▶ Member of the public inquired, school superintendent said "we read it in closed session."

32

Pinckneyville School District:

- ▶ **Section 2(e) of the Open Meetings Act:**
 - ▶ Requires a “public recital” of the business being conducted.
 - ▶ *Springfield School District* case: Illinois Supreme Court said that giving sufficient information to identify a particular transaction is enough.
- ▶ **PAC**
 - ▶ School Board has to say more than “it’s a notice to remedy.”
 - ▶ Board did not identify the teacher to be served with the Notice.
 - ▶ Board should have given more details at the time the resolution was adopted.

33

City of Newton:

- ▶ **Facts:**
 - ▶ City desired to increase permit application fees from \$100 to \$500.
 - ▶ The City did *not* want to draw attention to what it was doing.
 - ▶ So, the City posted an agenda with this on it:
 - ▶ “Consider and act on Ordinance 19-11 to Amend Section 33-4-4(F).”
 - ▶ Watchdog complained to PAC that this agenda item was insufficient to alert the public as to what was going on.

34

City of Newton:

► **Section 2.02(c) of OMA:**

- Any agenda "shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting."

► **PAC:**

- "General subject matter" requires more detail than that provided by the City.
- "A member of the public who is not familiar with the numbering of the City Code would have had to guess as to the document that was to be amended."

35

City of Bunker Hill: Duty to Preserve Records

► **In a Nutshell:**

- **Ordinarily:** Districts have a duty to preserve public records under the Local Records Act.
- **PAC:** You also have a duty to preserve records under FOIA now, too.

► **Facts:**

- City tried to have a meeting, not enough trustees showed up for a quorum.
- FOIA Requestor asked for the audio tape from that "meeting."

36

City of Bunker Hill: Duty to Preserve Records

► Facts:

- ▶ Attorney: There was no meeting, so “it’s all VOID. No need to fulfill this request.”
- ▶ PAC gets involved.
- ▶ City Clerk / FOIA Officer tells the PAC that the City no longer had a copy of the tape recording because it was deleted *after* the requestor asked for it.

37

City of Bunker Hill: Duty to Preserve Records

► PAC's Binding Opinion:

- ▶ Public bodies have a duty under FOIA to preserve records.
- ▶ PAC admits nothing in FOIA says that.
- ▶ Arrived at that conclusion by citing FOIA's requirement that each public body shall make available all public records.
- ▶ If it were otherwise, then FOIA's purpose would be defeated.

38

City of Bunker Hill: Duty to Preserve Records

► **Questions Remaining:**

- ▶ Do public bodies have to keep all records they generate for all time?
- ▶ What recourse is there for the PAC?

► **Takeaways:**

- ▶ Don't destroy public records!
- ▶ Bad idea under either FOIA or the Local Records Act.
- ▶ Could subject you to criminal penalties.

39

Chicago PD: Deliberative Process Exception

► **Facts:**

- ▶ Requestor asked for an "extradition monthly calendar."
- ▶ A monthly work schedule for employees in the extradition section during second watch for the purpose of aiding them in notifying the sergeant of their schedule.
- ▶ CPD denied the request using the "deliberative process" exception.
- ▶ CPD: these calendars "contain recommendations regarding assignments and are not an official CPD document."
- ▶ Constantly updated / corrected based on the evolving schedules of the officers on second watch.

40

Chicago PD: Deliberative Process Exception

► Section 7(1)(f) of FOIA

- ▶ Exempts from disclosure "inter- and intra-agency predecisional and deliberative material."
- ▶ Intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made.

► PAC:

- ▶ Deliberative process exception does *not* exempt purely factual material.
- ▶ The calendars are purely factual materials; they do not reflect the officers' thoughts or opinions on the schedules.

41

New Cases



42

Hernandez v. Lifeline Ambulance

► **Facts:**

- Plaintiff's vehicle was struck by a private ambulance.
- At the time, the ambulance was traveling to pick up a patient for a non-emergent transport.
- Plaintiff sued for personal injury.
- Plaintiff's suit was tossed out because of the EMS Act's immunity.

43

Hernandez v. Lifeline Ambulance

► **EMS Act Immunity:**

- "Any person, agency or governmental body . . . who in good faith provides emergency or non-emergency medical services during a Department approved training course, in the normal course of conducting their duties, or in an emergency, shall not be civilly liable, [except for] willful and wanton misconduct."
- "Non-emergency medical services" defined as:
 - "Medical care rendered to patients . . . Before or during transport of such patients to or from health care facilities visited for the purpose of obtaining medical or health care"

44

Hernandez v. Lifeline Ambulance

► **Holding:**

- The First District Appellate Court held the EMS Act Immunity did not apply.
- The ambulance driver was not immune from liability for negligent conduct involving an accident while the ambulance was en route to pick up a patient for a non-emergency transport.
- In other words, the court concluded that the immunity protections under the Act for a non-emergency transport only extend to that period in which a patient is being transported.

45

Hernandez v. Lifeline Ambulance

► **Pending before the Illinois Supreme Court now.**

- Appellate court misquoted the definition of "non-emergency medical services" by omitting "before."
- "Medical care rendered to patients . . . before or during transport of such patients to or from health care facilities visited for the purpose of obtaining medical or health care"

► **Conflicts with at least two Supreme Court decisions.**

- Which the appellate court did not discuss.

46

Chicago v. FOP

► **Facts:**

- ▶ Chicago had a CBA with its police officers.
- ▶ The CBA required the City to *destroy* disciplinary records after a certain time.
- ▶ The City refused to destroy records (after being ordered to cease and desist by a federal court).
- ▶ The Union filed a grievance, which made its way to arbitration.
- ▶ Arbitrator ruled that the City had to destroy the records, as it had agreed.
- ▶ The City challenged the arbitration award in court.

47

Chicago v. FOP

► **Holding:**

- ▶ The Appellate Court vacated the arbitration and held that the City was not required to destroy the records.
- ▶ The arbitration award “ignored the requirements of the Local Records Act and obviates the local record commission's authority to determine what records should be destroyed or maintained.”

► **Takeaway:**

- ▶ If your Union asks you to destroy documents, say NO!

48

PSEBA: Cronin v. Skokie

► **Facts:**

- A Firefighter / EMT began experiencing pain after transporting a patient who appeared to be in cardiac arrest.
- Firefighter was diagnosed with ascending aortic aneurysm approximately one year prior, but had continued to work.
- Received a line-of-duty pension.
- Applied for PSEBA, which the Village denied.

49

PSEBA: Cronin v. Skokie

► **PSEBA: Two Prongs --**

- 1. Catastrophically injured,
- 2. As a result of a response to what is reasonably believed to be an emergency.

► **Village:**

- First prong? No problem given the line of duty pension.
- Second prong: the firefighter's response to the call did not cause his preexisting aneurysm.

50

PSEBA: Cronin v. Skokie

► **The Court:**

- Firefighter was entitled to PSEBA.
- Second prong met because the firefighter presented evidence that his actions on the call were in response to what he reasonably believed to be an emergency.

51

PSEBA: Cronin v. Skokie

► **Takeaway:**

- To the extent the District wishes to challenge the first prong of PSEBA, it must intervene in the disability pension proceeding to do so.
- Causation is taken up at the first prong.
- Only inquiry at the second prong is whether the disability occurred in what was reasonably believed to be an emergency (or other qualifying events).

52

PSEBA: Beckman v. Peoria

► Facts:

- ▶ During riot training, a police officer officer and her colleagues wore full riot gear and exited a transport vehicle. While walking, she fell on an ice patch.
- ▶ Officer testified she treated the simulation as a "real life" emergency.
- ▶ Officer suffered a career-ending "catastrophic injury" (First PSEBA Prong).
- ▶ City hearing officer denied health coverage benefits under section 10 of Public Safety Employee Benefits Act.

53

PSEBA: Beckman v. Peoria

► Holding:

- ▶ The officer's injuries occurred in response to treating a training simulation as a real-life emergency, rather than in response to an actual life-threatening or dangerous situation.
- ▶ The riot simulation under controlled conditions created no actual imminent danger to Plaintiff or her colleagues.
- ▶ Officer could not reasonably believed to be responding to an emergency.

54

PSEBA: Beckman v. Peoria

► Takeaway:

- ▶ A purely subjective belief by a firefighter that he or she is responding to an emergency during a training exercise alone is insufficient to establish the second prong of PSEBA.

55

Antitrust Cases

Alarm Detection Systems, Inc. v. Orland Fire Protection District

► Facts:

- ▶ Alarm companies sued against several fire districts/municipalities, which had passed ordinances allowing only one alarm-system provider to operate within their territories.
- ▶ Claimed there was a monopoly established in violation of the antitrust laws.

► Seventh Circuit:

- ▶ No antitrust problem.
- ▶ Fire districts, as governments, are able to impose restraints on trade.

56

QUESTION AND ANSWER TIME

Any related subject

- ▶ Do you have Questions?
- ▶ Disclaimer: the legal advice provided today is free, but you get what you pay for...

THANK YOU!

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Advice**