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Pension board members must maintain their impartiality

by Ericka J. Thomas

Administrative proceedings can be complicated by a number of matters such as the complexity of the issues before the tribunal and the number of parties involved. When such complications arise, it is imperative that the tribunal and its individual members take extra precautions to ensure that due process is being administered appropriately and that the fairness of the proceeding is not questioned. Failure to take such precautions can cause the tribunal's findings and decision to be questioned, and possibly overturned, during an administrative review proceeding.

In *Williams v. Board of Trustees of the Morton Grove Firefighters' Pension Fund*, ___ Ill.App.3d ___, 2010 WL 395642 (1st District, February 2, 2010), the First District Appellate Court reversed a pension fund's decision and remanded the case to the Board to conduct a new hearing because blurred lines of impartiality raised questions of fairness. In *Williams*, a firefighter applied for a line-of-duty disability pension, with an alternative claim for non-duty benefits. Williams claimed that he had injured his shoulder while responding to an ambulance call during which he transferred a patient from an ambulance cot to a hospital gurney. Nevertheless, Williams returned to full duty.

Approximately six months after the injury, when physical therapy and

steroid injections had not alleviated his problems, he underwent arthroscopic surgery to repair a SLAP tear. During the surgery, the doctor also found AC osteoarthritis, rotator cuff tendonitis, and inflammation of the bursa. After several months of physical therapy, Williams underwent a second surgery. While undergoing physical therapy after the second surgery, he re-injured his shoulder and ultimately was diagnosed with a frozen shoulder.

At the time Williams filed his application for disability pension benefits, the Illinois Pension Code required that a village firefighter pension board consist of three active firefighters, one retired firefighter, the president of the village board of trustees, the village clerk, the village corporate attorney, the village treasurer, and the chief of the fire department. The day before his disability pension benefits hearing was to begin, the Village requested leave to intervene. Williams opposed the Village's petition and argued that the hearing would become adversarial if the Village were allowed to intervene. Ultimately, the Board not only allowed the Village to intervene in the hearing, but also allowed the Village to fully participate in the hearing and present evidence.

Williams then requested that all of the Village officials on the Board, ex-

Non-compliance with Administrative Review Law leads to dismissal of pension appeal

by David T. Zafiratos

Failure to comply with certain requirements of the Illinois Administrative Review Law required the dismissal of a lawsuit challenging a decision by the Illinois Municipal Retirement Fund in *Ross v. Illinois Municipal Retirement Fund*, 395 Ill.App.3d 1073 (5th Dist. 2009). The case involved the termination of IMRF disability benefits paid to St. Clair County Housing Authority employee Robin Ross from 2001 to 2002. After the IMRF Board of Trustees upheld the termination of benefits, Ross filed a lawsuit under the Administrative Review Law appealing the Board's decision. (735 ILCS 5/3-101 *et seq.*)

Because Ross's lawsuit contained certain procedural filing defects and was improperly served upon the IMRF, the appellate court focused on the consequences of failure to comply with the Administrative Review Law's technical requirements. Ross and the IMRF eventually reached an agreement that Ross would withdraw her case voluntarily and re-file it to cure the technical defects. The appellate court, however, ruled Ross could not re-file her complaint, despite her voluntary dismissal and agreement with the IMRF.

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Causation continues to complicate duty-related disability pension applications

by Ericka J. Thomas

Over the last several years, there has been an increasing focus on causation of disabilities that form the basis for on-duty disability pension applications under both Illinois' police and fire pension codes. This could be a result of more exact medical science or pension funds analyzing the evidence more stringently. Either way, pension applicants must be able to prove that the on-duty incidents were a "cause" of their disabilities rather than simply an aggravation of "symptoms" of pre-existing conditions.

The First District Appellate Court recently considered a case with just this issue. In *Cole v. Retirement Board*,

396 Ill.App.3d 357 (1st Dist. 2009), a Chicago police officer applied for line-of-duty disability benefits after being injured during a number of incidents, including multiple car accidents and several falls. Due to the sheer number of injuries suffered by the officer, the independent medical examiners had a difficult time determining the causation of the officer's disability. Additionally, the Board found that several of the falls - which occurred while the officer was on-duty in and around the police station - were not line-of-duty injuries as defined by the Illinois Pension Code. (40 ILCS 5/5-113) Therefore, the Board concluded that any resulting injury from those incidents did not entitle Cole to

duty disability benefits. The Board ultimately found that Cole was disabled, but only granted her ordinary disability benefits.

Thereafter, Cole filed an administrative review action requesting the circuit court to award her duty disability benefits at 75% of her salary and pre-judgment interest. The trial court agreed that the Board's decision was incorrect and remanded the action to the Board with instructions to award Cole duty disability benefits at 50% of her salary. The Board then filed an appeal. Despite the fact that the trial court did not fully rule in her fa-

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Through the Administrative Review Law, courts have the authority to review the decisions of administrative agencies. As a statutory grant of authority to the courts, however, anyone who files a lawsuit under the Administrative Review Law must comply with all of its requirements. Failure to meet one of the Administrative Review Law's technical requirements will deprive the court of jurisdiction to hear the case, and the case must be dismissed.

The technical requirements of the Administrative Review Law include (1) filing a complaint within the 35-day time limit; (2) serving a summons on all defendants; and (3) naming as defendants all parties of record in the proceeding. When Ross filed her complaint for administrative review, she failed to name specifically the IMRF Board of Trustees as a defendant and to serve the Board with a summons. Based on these defects, the Board filed a motion to dismiss the complaint for failing to meet the requirements of the Administrative Review Law.

Before the court could rule on the motion to dismiss, Ross voluntarily withdrew her complaint. Later Ross argued she withdrew the case voluntarily based on an agreement with the Board that she would re-file the complaint and properly name the Board as a defendant.

Failure to meet one of the Administrative Review Law's technical requirements will deprive the court of jurisdiction to hear the case, and the case must be dismissed.

Although the Board acknowledged this agreement, once Ross re-filed her complaint, they filed a motion to dismiss, arguing the Administrative Review Law did not authorize the re-filing. Section 3-102 of the Administrative Review Law does, in fact, provide that administrative review proceedings terminate upon a voluntary dismissal (735 ILCS 5/2-102). The Board argued the agreement did not matter because Ross's vol-

untary dismissal terminated the administrative review proceedings and the court's jurisdiction to hear her case.

The circuit court refused to dismiss Ross's complaint, and denied the Board's motion to dismiss. After reviewing the Board's decision to terminate Ross's benefits, the court reversed the Board's decision, ruling it was against the manifest weight of the evidence. The Board appealed the circuit court's decision to the Illinois Appellate Court.

The appellate court reversed the circuit court's decision, holding it lacked jurisdiction to review the Board's decision. The appellate court noted the Administrative Review law specifically states a voluntarily dismissed petition may not be re-filed and reiterated the statutory requirements of the Administrative Review Law regarding jurisdiction. Again, this means if a plaintiff fails to strictly comply with the statutory requirements of the law, the court no longer has authority to hear the case.

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While the Administrative Review Law does provide some exceptions to the statutory requirements to avoid potentially harsh results, none of the exceptions applied to Ross's complaint. Additionally, case law supports the re-filing of a complaint for administrative review under very narrow circumstances, but not the circumstances of Ross's complaint. ■

Attorney Notes

■ **Karl Ottosen** was named an Illinois Super Lawyer for the fifth consecutive year and **Shawn Flaherty** was designated as a Rising Star for the third straight year by *Law & Politics* in its *Illinois Super Lawyers* publication. Karl and Shawn were recognized for their expertise in the representation of Government / Cities / Municipalities. Only the top 5% or fewer of Illinois attorneys are recognized for their outstanding professional achievements.

■ **Carolyn Clifford's** article "The Smoking Firefighter: Public Policy Dilemmas for Firefighter Pension Funds" appeared in the February 2010 National Association of Public Pension Attorneys newsletter, *The NAPPA Report*. The article focused on legislation enforcing smoking restrictions, the impact of smoking on occupational disease disability pension applications, and the dilemma for fire departments that are financially impacted by firefighter smoking. ■

Causation continues to complicate duty-related disability pension applications

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vor, Cole did not file a cross appeal. Since Cole failed to file a cross appeal, the appellate court determined that it was prohibited from considering whether she was entitled to benefits at 75% of her salary or pre-judgment interest. The court solely considered whether the Board's decision to deny her duty disability benefits was against the manifest weight of the evidence.

The court considered three sections of the Illinois Pension Code in this case. Cole applied for a duty disability pension as provided in Section 5-154 of the Illinois Pension Code, which provides in pertinent part as follows:

(a) An active policeman who becomes disabled on or after the effective date as the result of injury incurred on or after such date in the performance of an act of duty, has a right to receive duty disability benefit during any period of such disability for which he does not have a right to receive salary, equal to 75% of his salary, as salary is defined in this Article, at the time the disability is allowed... (40 ILCS 5/5-154(a))

Instead, the Board awarded Cole an ordinary disability benefit pursuant to Section 5-155 of the Code, which pro-

vides in pertinent part as follows:

A policeman less than age 63 who becomes disabled after the effective date as the result of any cause other than injury incurred in the performance of an act of duty, shall receive ordinary disability benefit during any period or periods of disability exceeding 30 days for which he does not have a right to receive any part of his salary... Ordinary disability benefit shall be 50% of the policeman's salary, as salary is defined in this Article, at the time disability occurs. (40 ILCS 5/5-155)

In reversing the decision of the Board, the circuit court found that Cole was "disabled as a result of injuries incurred in the performance of active duty, however said disability resulted from a physical defect which existed at the time the injury was sustained." The court ordered that the Board award Cole a duty disability benefit pursuant to Section 5-154(a) (i), which provides in pertinent part as follows:

If the disability resulted from any physical defect or mental disorder or any disease which existed at the time the injury was sustained, or if the disability is less than 50% of

total disability for any service of a remunerative character, the duty disability benefit shall be 50% of salary as defined in this Article. (40 ILCS 5/5-154(a)(i))

The appellate court concluded based upon the evidence in the record that Cole's disability resulted from a pre-existing condition, degenerative disc and joint disease, which existed at the time she incurred a line-of-duty injury. Such a finding entitled her to a 50% duty disability benefit until age 63 or she retires as opposed to the 50% ordinary disability benefit for a limited time that had been awarded by the Board. The appellate court upheld the circuit court's decision and specifically found that its decision to change the basis of a pension award was within its authority under the Administrative Review Law.

This case is instructive because it exemplifies the growing trend of pension boards and courts to focus on the actual causation of an applicant's injury. In addition to proving that they are disabled, applicants must be able to prove that despite pre-existing conditions, the on-duty incident was the cause of their disability and did not simply make their pre-existing condition symptomatic. ■

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cept the fire chief, recuse themselves from the hearing because there was a *per se* conflict of interest. All of these officials testified that they could be fair and impartial and declined to step down.

Thereafter, the Village corporate attorney played a very active role in the hearing. She unilaterally released a copy of the record to the Village's outside counsel before the Village had become party to the proceedings and frequently objected to evidence presented by Williams. The Board received extensive medical testimony from three IME physicians selected by the Board, Williams' own physician, and an independent forensic medical examiner who the Village hired. Due to the conflicting medical evidence about the nature and cause of his disability, the Board ultimately granted Williams a non-duty disability pension. The Board's decision was upheld by the circuit court on administrative review, with virtually no comment on the secondary issues regarding conflict of interest or due process concerns. Williams appealed the circuit court's decision.

The First District Appellate Court had a different opinion about the proceedings during Williams' hearing. Initially, the court determined that the

Board did have the authority under Article 4 of the Illinois Pension Code to decide who may participate in a hearing and to what extent. The court heavily relied on the analysis in the 2004 case of *Village of Stickney v. Board of Trustees of the Police Pension Fund*, which determined that a board had such discretion and authority under Article 3 of the Illinois Pension Code. The court cautioned that this discretion is not unlimited and can be abused.

Williams complained that the Village corporate attorney's participation violated his right to a fair and impartial hearing because she was biased against him and had a conflict of interest that infected the entire process. The court agreed that the Village corporate attorney infected the proceedings and resulted in an unfair hearing on his application. The court pointed specifically to the Village corporate attorney's unilateral decision to provide the Board's exhibits to an outside attorney hired by the Village, and noted that her conduct during the hearing was more akin to advocacy than the statements of a disinterested decision maker.

The court observed that the Village corporate attorney made frequent objec-

tions to questions by Williams' counsel, moved to bar an entire line of questioning about a discrimination charge that Williams had filed against the Village, and extensively questioned certain medical witnesses. The court stated that her actions demonstrated she was advocating on behalf of the Village rather than being disinterested and had infected the entire proceeding. Accordingly, the court reversed the Board's decision and remanded the case to the Board for a new hearing to be conducted by a Board that is constituted pursuant to the amended version of Section 4-121 of the Illinois Pension Code. (40 ILCS 5/4-121) The court specifically did not rule on the Board's determination that Williams was not entitled to a line-of-duty disability pension, and there is no indication in the court's decision that the Board's conclusion was improper or against the manifest weight of the evidence.

It is important for board members to constantly maintain their roles as unbiased and disinterested decision makers. Although some board members may develop strong opinions in particular cases and may be tempted to adopt an advocacy role, the decision in the *Williams* case should be a deterrent. ■

Ottosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, *Legal Insights for Pension Boards*, is issued periodically to keep 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:

OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

1804 North Naper Boulevard, Suite 350

Naperville, Illinois 60563

(630) 682-0085 www.obkcg.com FAX (630) 682-0788

Carolyn Welch Clifford, Editor cclifford@obkcg.com

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