

LEGALINSIGHTS

FOR FIRE PROTECTION DISTRICTS

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P.A. 97-0251: Resolving practical concerns of the New Firefighter Hiring Bill

by Shawn P. Flaherty and Joseph Sheahan

On August 4, 2011 the procedure the commission used for appointment of new firefighters in Illinois dramatically changed. Public Act 97-0251 introduced new, comprehensive legislation that offered options to and imposed new requirements on Boards of Commissioners. Since the implementation of the New Hire Bill, our clients have encountered a number of interesting issues regarding its practical application. Here, we offer some insight and answers to several of the most frequently encountered questions.

Mean Scoring

One of the major changes with the New Hire Bill requires candidates placed on the final eligibility register to achieve a score at or above the average score of all candidates on the initial eligibility register plus ten percent (10%). For example, if the average score of all candidates on the initial eligibility register is 70, to be placed on the final eligibility register, a candidate's score must be at least 77. The purpose of the initial eligibility register is to weed out mediocre candidates so only the most qualified applicants continue on in the testing process. Unfortunately, some fire protection districts have experienced an interesting problem when applying this provision.

In some instances, when 10% is added to the average score of the initial eligibility register, all candidates are ex-

cluded from the final eligibility register. This dilemma occurs in one of two ways when there is little difference between the overall scores of the candidates.

In the first instance all candidates on the initial eligibility register score high grades. Accordingly the qualifying score for placement on the final eligibility register exceeds the highest possible score that could be achieved. For example, if the average score of candidates on the initial eligibility register is 95, adding 10% (or 9.5 points) would make the minimum qualifying score for placement on the final eligibility register 104.5 points. Since the scores are based on a 100-point scale, no candidate would survive this cut.

The second instance occurs when candidates' scores are clustered in a lower range, but no candidate achieves the minimum qualifying score. For example, if the average score of candidates on the initial eligibility register is 70, adding 10% (or 7 points) would make the minimum qualifying score for placement on the final eligibility register 77 points. In this scenario, candidates must score 77 points or higher for placement on the initial eligibility register. If all candidates score below 77 points, an initial eligibility register cannot be established. Both of these situations can effectively exclude all potential candidates from further test-

Firefighter seizure history and NFPA 1582

by Ericka J. Thomas and Joseph Sheahan

In today's litigious society, it is no wonder that most employers, and indeed a good number of individuals, are fearful they will be hauled into court to defend their actions. While a certain amount of prudence is required to avoid litigation when making business decisions, a fear of lawsuits should not be the deciding factor. For example, when a fire protection district is hiring a firefighter, it should not base its selection solely on the possibility that a candidate may file a lawsuit if not offered employment.

Instead, fire protection districts must remember their primary objective is to protect the people they serve. This duty cannot be sacrificed or compromised simply because a candidate has threatened suit if not offered employment. Rather, the most appropriate and most qualified candidate should be offered employment.

The District Court for the Northern District of Illinois recently considered such a situation in *Wheeler v. Lisle-Woodridge Fire Protection Dist.*, ~ F.Supp.2d ~, 2011 WL 1429109. Wheeler filed a claim alleging the Lisle-Woodridge Fire Protection District ("the District") violated the Americans With Disabilities Act ("ADA") when it revoked its conditional offer of employment after being informed by its occu-

Continued on page 2

Continued on page 2

New Firefighter Hiring Bill

Continued from page 1

ing. This is certainly not what the legislature intended. We are hopeful this could be statutorily amended.

Fortunately, the solution to this dilemma is relatively simple. In our experience when this situation arises we encourage a fire department to include individuals who did not show up for the oral examination when calculating the average score. Because the individuals failed to show up for the oral examination, their scores would be zero. When the lower scores are factored into the calculation, the average score (and consequently the qualifying score) is lowered. This method of calculation would lower the qualifying score thus increasing the number of candidates on the final eligibility register. In summary, it is clear that the thrust of the new legislation was to incrementally narrow the pool of candidates to be considered for positions as the testing process progresses, but not to eliminate all candidates from consideration.

Preference Points Application

This new legislation also greatly expands the realm of preference points, by including new categories of preference points and granting the commissioners authority to set the number of points available. However, this is not without limitation. Commissioners may set the amount of preference points for every category except veteran's preference points, which is statutorily set at five (5) points. There is an additional provision in the Act that states that no award of preference points can enable a non-veteran to pass a veteran on the final eligibility register. In our professional judgment, we have interpreted this provision to apply

to the award of experience preference points. This language was contained in the previous version of the hiring law when preference point categories were limited to only veteran's preference and experience preference points. Additionally, the language employed in the new provision seems to suggest this conclusion. The ambiguity presented by this new provision may have been a legislative oversight, and it must be pointed out that, due to the fresh status of this legislation, this provision has not been tested by a court of law. However, it is our position that a non-veteran may pass a veteran on the final eligibility register, provided the non-veteran's preference points have not been awarded for experience.

On the topic of preference points, the New Hire Bill allows commissioners to award up to five preference points for unique categories based on an applicant's experience and background. Some preference point categories have limitations and care must be taken not to violate federal and state anti-discrimination laws when awarding these points. Additionally, commissioners must announce the categories of preference points available prior to the testing process. Permissible categories include, bilingual capabilities, including Spanish or American Sign Language, previous leadership experience, contract paramedic service, or commitment to community service. Prior to announcing the applicable criteria for preference point categories, commissioners are encouraged to consult their attorney to ensure the classification is permissible under anti-discrimination and equal protection laws.

Continued on page 3

Firefighter seizure history

Continued from page 1

pational doctor that the applicant was unfit for duty. Specifically, Wheeler alleged the District withdrew its employment offer because of his seizure disorder, which he claimed was a disability falling within the ambit of the ADA.

Fire protection districts are duty bound to protect the people they serve. In fulfilling this duty, a district must employ firefighters who do not pose a risk to the health, safety or welfare of the public and fellow firefighters. Accordingly, the law allows pre-employment testing of candidates and virtually every fire department and fire protection district conduct such examinations. In *Wheeler*, pursuant to the Board of Fire Commissioner Rules, the standards for testing and evaluation of applicants were to "be based on the suggestions of the District's physician and other consultants as deemed appropriate by the Board and on the most current National Fire Protection Association (NFPA) guidelines."

NFPA 1582 is the Standard of Comprehensive Occupational Medical Program for Fire Departments used by the District. Under NFPA 1582, to be considered fit for duty an applicant with epilepsy or other seizure disorder must have completed five years without a seizure on a stable medical regimen or completed one year without a seizure after discontinuing all anti-epileptic drugs.

Following his conditional offer of employment, Wheeler met with the District's physician to undergo the required physical examination. Just a few months prior to this examination, he had an identical pre-employment physical examination

Continued on page 4

New Firefighter Hiring Bill

Continued from page 2

Physical Ability Testing

A final issue to arise following the implementation of the New Hire Bill relates to the physical ability test, specifically the use of a ladder test. The Act allows a local hiring authority to either conduct its own physical ability test, or use an acceptable alternative, such as the Candidate Physical Ability Test (CPAT).

If the hiring authority elects to conduct its own physical ability test, the Act sets forth the components for that portion of the test. Consequently, the physical ability test should be based on industry standards and should be designed to test the candidate's ability in three categories: muscular strength, the ability to climb ladders, and the ability to carry out critical, time-sensitive, and complex problem solving. However, this portion of the

Act contains a parenthetical caveat that allows the hiring authority to conduct "a similar test designed to ensure that the successful candidates are able to perform the essential functions of the firefighter's job description."

Because CPAT, as an acceptable alternative to examining candidates' physical ability, does not test the ability to climb a ladder, and the language in the statute includes a provision calling for such a test when a local commission elects to conduct its own testing process, the issue becomes whether the testing of a candidate's ability to climb a ladder, set forth in the Act, is a mandatory provision. It is our view that this

provision aims solely to provide guidance when fashioning its own physical ability examination. It is not necessarily mandatory. While this interpretation has not been tested by a court of law, we contend that the closer the examination is to the CPAT process, the more likely it will be valid. Since CPAT is an accepted alternative, and considering the fact that the statute expressly provides for a commission to conduct "a similar test," it is our view that a ladder climb is not an essential portion of the physical ability examination, so long as the examination, taken collectively, closely mirrors the CPAT process.

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Unsurprisingly, this comprehensive legislation is not without glitches. It is nearly impossible to draft a perfect piece of unintended consequences arise only after implementation. Through an examination of the legislative history and the intent of the lawmakers, we are able to make calculated decisions regarding those issues frequently encountered with the new Act.

While courts have not yet tested ours or any interpretation of the New Hire Bill, we are confident that these interpretations represent a best practice as to how to assemble a full-time eligibility register under this Act.

If you should have any questions, please do not hesitate to contact your fire department attorney. ■

Hurst case: Public employer is not an eavesdropper

By Donald R. Tyer

In *Hurst v. The Board of the Fire and Police Commission*, 2011 IL App, (4th) 100,964, the Illinois Appellate Court for the Fourth District upheld a decision by the Board of the Fire and Police Commission of Clinton, Illinois (the "Board") to discharge a police officer for accessing pornographic websites on a mobile data terminal while on duty. Hurst was terminated from his job as a police officer after his department used Web Watcher software to intercept pornographic imagery on the terminal that Hurst used. Following the Board's decision to terminate him, Hurst filed an amended complaint for administrative review arguing that the Police Department violated the Illinois eavesdropping statute by utilizing Web Watcher software to collect evidence used to terminate him.

The Board and the Chief of Police filed a Motion to Dismiss which was granted by the circuit court. On appeal, the appellate court agreed with the Board and Chief, holding that the eavesdropping statute protects electronic communication that both parties intend to be private. The court found no evidence that the parties transmitting pornographic images to the data terminal had any desire to keep those images private; the websites that sent Hurst pornography were not sending images to him exclusively. The Illinois Eavesdropping Statute provides protections for electronic communications that are defined as the "[t]ransfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or part by a wire, radio, pager, computer, electromagnetic, photo electronic or photo optical system, where the sending and receiving parties intend the electronic communication to be private and the interception, re-

Continued on page 4

Hurst case

Continued from page 3

ording, or transcription of the electronic communication is accomplished by a device in a surreptitious manner.” (720 ILCS 5/14-1(E)) Accordingly, the transmissions that Hurst accessed on his terminal were not protected under the eavesdropping statute.

The court further held that Hurst had no reasonable expectation of privacy in the transmissions because the Police Department Policy and Procedures Manual specifically stated that the mobile data terminals were for law enforcement purposes only and should not be used in any way that might discredit the department. Finally, the policy manual noted that messages sent on these systems were “retrievable,” thus putting Hurst on notice that he should have no expectation that communications on this network were private. Thus, the appellate court found there was no violation of the eavesdropping statute and upheld the officer’s dismissal.

This decision highlights the necessity for police and fire departments to have updated electronic acceptable use policies particularly in light of the ever-expanding capabilities of devices to access information on a variety of networks. The ability to download or exchange objectionable information is no longer limited to desktops or laptops, but also smart phones. Caution is recommended. ■

Firefighter seizure history

Continued from page 2

by the same physician, but for employment with a different department. It was at Wheeler’s initial examination that the physician learned of his seizure disorder, and that he was still on a medication regimen to control his seizure activity. The physician found that candidates with an uncontrolled seizure disorder present potential harm to the public at large and to fellow firefighters as well. At his second pre-employment physical examination, this time for the District, the physician recognized and remembered Wheeler from his previous examination. With Wheeler and the District’s permission, the physician used Wheeler’s previous examination to determine his fitness for employment as a firefighter.

Ultimately, the physician concluded that Wheeler was still within the five year window of ineligibility for employment as a firefighter under the NFPA 1582 standards, because he was on a medication regimen to control his seizure activity. As a result, the physician wrote a letter to the District stating that Wheeler was found unfit for duty. Consequently, the District revoked its conditional employment offer.

The letter from the examining physician did not elaborate on the reasons for finding Wheeler unfit for employment as a firefighter. The District was

only aware that under the NFPA standards, the examining physician found the candidate unfit for duty, and based its decision to revoke the employment offer solely on the physician’s finding. The court determined this lack of information insulated the District from discrimination claims, such as the one alleged by Wheeler. Simply stated, Wheeler could not produce any evidence that the District was aware of his seizure disorder when it revoked the employment offer.

Withdrawal of an employment offer is discouraging and disheartening to a candidate who was poised to secure a position. The *Wheeler* decision reinforces the concept that fire protection districts have a duty to ensure the protection and safety of the public they serve. To compromise this duty by hiring a candidate who is unfit for employment as a firefighter simply to avoid litigation, could actually expose the district to more serious and more credible liability. For this reason, fire protection districts are encouraged to continue their employment practice of conducting pre-employment physicals to ensure employee fitness for duty. *Wheeler* stands as a good example of a fire protection district adhering to the applicable law and rules and prevailing during litigation. ■

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