

LEGALINSIGHTS

FOR FIRE PROTECTION DISTRICTS

OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

Volume 17, No. 3 - - Fall 2010

Extending probationary period beyond twelve months ruled unlawful

by David T. Zafiratos

The twelve month probationary period for new firefighters allows fire protection districts to evaluate new hires as they perform their jobs, before they gain the full protection of the Illinois Fire Protection District Act. (70 ILCS 705/1 *et seq.*) In an effort to preserve the intention of the probationary period, some fire protection districts have allowed for an extended probationary period if a firefighter is absent for a significant portion of the first year due to an injury. Extending the probationary period because of a prolonged absence due to injury not only allows the employer to fully evaluate new firefighters, but also protects probationary firefighters.

A recent decision of the Seventh Circuit of the United States Court of Appeals rejected the practice of extending the probationary period for prolonged injury absences. In *Kodish v. Oakbrook Terrace Fire Protection District*, 604 F.3d 490 (7th Cir. 2010), the court ruled fire protection districts may not extend the probationary period for any reason other than to allow firefighters to obtain paramedic certification. Although the court's written opinion notes the policy reasons in favor of extending the probationary period, the court ultimately decided that to hold a position as a firefighter for one year does not mean the firefighter must actually perform the job for one year.

Section 16.13b of the Fire Protection District Act requires that before a fire district can terminate a firefighter, it must provide written charges and conduct a hearing before the board of fire commissioners. Probationary firefighters are not entitled to the protections of Section 16.13b, but may be terminated without charges and a hearing.

Extending the probationary period essentially provides a second chance to probationary firefighters injured off-duty, who would not be protected under the Illinois Workers' Compensation Act and do not have sufficient creditable service for a non-duty disability pension. The alternative to extending the probationary period for these individuals, if an employer had doubts about an injured firefighter's ability to effectively perform the job, would be to simply discharge the probationary firefighter at the time the injury occurred.

Hired in June of 2003, Firefighter Kodish suffered an off-duty injury six months into his probationary period. He eventually became unable to work, and missed the last four months of his probationary period because of his injury. The Plaintiff returned to work in July of 2004, thirteen months after his date of hire. In August of 2004, fourteen months after his date of hire, the District terminated him without

"Fireman's Rule" not always a bar to recovery

by Donald L. Potts

The "fireman's rule" limits the ability of firefighters and other public officers to sue a property owner when they are injured responding to an emergency call. Based on the concept of "assumption of the risk," the fireman's rule means that firefighters voluntarily subject themselves to certain hazards while fighting fires and responding to other emergencies. However, a firefighter does not assume the risk of any hazard that would be faced by an ordinary citizen entering the property, but only those hazards resulting from the emergency itself.

Recently, in *Rusch v. Leonard*, 399 Ill.App. 3d 1026 (2010), the Illinois Appellate Court considered the application of the fireman's rule. James Rusch, a firefighter-paramedic employed by the Countryside Fire Protection District responded to an emergency call concerning an injured person on private property owned by Defendants, Kyle and Cynthia Leonard. The property was undergoing renovation at the time, and the injured person had fallen from the attic of the building to the second floor. The only access to the second floor from the first floor was a temporary stairway that did not have any handrails. Rusch injured himself carrying the patient down this temporary stairway, and he sued the Leonards and their contractor.

Continued on page 2

Continued on page 4

Probationary Period

Continued from page 1

charges and without a hearing before the Board of Fire Commissioners. By District policy, a firefighter's probationary period could be extended "if the employee is absent from duty for a period of more than thirty (30) calendar days continuously or more than thirty (30) duty days in the aggregate."

The Plaintiff sued the District, arguing he was entitled to rights under Section 16.13b of the Fire Protection District Act. The District court ruled in favor of the District, citing the common-sense policy reasons for extending the probationary period. The Seventh Circuit Court of Appeals, however, reversed the District Court's decision and ruled in favor of the Plaintiff.

The Fire Protection District Act provides one exception to the twelve month probationary period, whereby the

probationary period may be extended. Section 16.13b of the Fire Protection District Act states:

Notwithstanding any other provision of this Section, a probationary employment period may be extended beyond one year for a firefighter who is required as a condition of employment to be a certified paramedic, during which time the sole reason that a firefighter may be discharged without a hearing is for failing to meet the requirements for paramedic certification. 70 ILCS 705/16.13b

The court reasoned that since the statute authorizes extension of the probationary period for purposes of obtaining a paramedic license, the legislature could

have added other reasons for extending the probationary period. However, allowing extra time to obtain a paramedic license is the only reason provided by the Fire Protection District Act for extending the probationary period beyond one year. Importantly, during this extended probationary period, the only grounds for which the firefighter may be discharged without a hearing is failure to obtain a paramedic's license.

The court also justified its decision by looking closely at the exact wording of Section 16.13b. According to the court, the phrase "held that position for one year" found in Section 16.13b of the Fire Protection District Act does not mean "performed the job for one year." Had the legislature intended the probationary period to require a full year of actually

Continued on page 4

Attorney Notes

■ **Donald L. Potts**, an associate in the Naperville office, has been called to active duty with the U.S. Army, beginning in November 2010. He will be assigned to the Pentagon in the International & Operational Law Division of the Office of The Judge Advocate General. Don, a Major in the Army Reserve is a member of the Judge Advocate General's Corps. This is Don's second mobilization, having served in Iraq in 2008-2009. Don is expected to return to OBKC&G in November 2011. The firm wishes Don the best during his leave and looks forward to his safe return next year.

■ On October 18 and 19, 2010, **John H. Kelly** presented on "Responsibilities of 9-1-1 Board Members" at the Illinois 9-1-1 Conference in Springfield, Illinois.

■ **Karl R. Ottosen** will participate in the 26th Annual Chicago-Kent College of Law Illinois Public Sector Labor Relations Law Conference to be held on Friday, December 3, 2010 in Chicago. Mr. Ottosen will be part of a four member panel discussing "Military Leave & Reintegrating Returning Military into the Workplace."

■ **Carolyn Welch Clifford** and **Shawn P. Flaherty** of the Naperville office attended the Illinois Public Pension Fund Association's Midwest Pension Conference on October 5 - 8, 2010 in St. Louis, Missouri. The conference featured workshops on Ethics Training, Investment Procedures, Fiduciary Responsibilities, and Legal and Legislative Updates.

■ On September 13, 2010, **John H. Kelly** participated in a mock trial and addressed "Liability Issues in the 9-1-1 Center" at the Georgia Emergency Communications Conference in Athens, Georgia. On September 15, 16, and 17, 2010, he presented three days of "Liability Training for Telecommunicators" in Shelby County, Tennessee.

■ **Carolyn Welch Clifford** and **Shawn P. Flaherty** are two of several instructors who taught the Northwestern University's School of Continuing Education new Public Pension Trustee Education Program held at Northwestern University's Evanston campus on Monday, September 27th through Thursday, September 30th. The Pension Trustee Education Program satisfies the State's educational requirements for Article 3 and 4 police and firefighter pension fund trustees. ■

Employment of Illinois workers on public works affects fire protection districts

by William R. Thomas

Effective June 16, 2010, Governor Pat Quinn signed into law Public Act 96-929, the Employment of Illinois Workers on Public Works. The revised law requires contractors to use a labor force consisting of 90% or more Illinois laborers on State public works projects when the State employment rate exceeds 5% for two consecutive calendar months. (30 ILCS 570/0.01) The Act applies to all construction contracts for public works projects or improvements that are funded in whole or in part with State funds or funds administered by the State of Illinois, including projects involving the clean up and on-site disposal of hazardous waste.

The Act specifically defines public works as, “[a]ny . . . fixed work construction or improvement for the State of Illinois or any political subdivision of the State if that fixed work construction or improvement is funded or financed in whole or in part with State funds or funds administered by the State of Illinois.” (30 ILCS 570/1(6)) Specifically, the law states that “a person or entity shall employ at least 90% Illinois laborers on such project.” (30 ILCS 570/3) The provisions of the Act are mandatory when the rate of unemployment in the State of Illinois exceeds 5% for two consecutive calendar months, and the public work project has been funded in whole or in part by the State of Illinois or is financed by federal funds administered by the State of Illinois and not in conflict with any federal statutes, rules or regulations to the contrary.

The Illinois Department of Labor has the authority to enforce the law and to visit and inspect at all reasonable times places covered by the Act.

The Department of Labor may also examine related documents and has the power to subpoena witnesses and other evidentiary documents. The Act designates civil penalties be levied on any person or entity violating the provisions of the law. The Act empowers the Attorney General’s Office to collect civil penalties on behalf of the Department of Labor as follows:

- First offense - \$1,000.00 maximum penalty for each violation
- Second offense - \$5,000.00 maximum penalty for each violation
- Third offense - \$15,000.00 maximum penalty for each violation

Separate violations can be imposed for each worker and each day the violations exist.

The Act also creates a private right of action, which permits any interested party or person aggrieved by a violation of the Act to file suit in the appropriate circuit court. The person or party whose rights have been violated under the Act would be entitled to collect attorneys’ fees, costs and compensatory damages not to exceed \$500.00 for each violation of the Act with a statute of limitations of three years from the date of completion and acceptance of the public works project in question.

This Act and its labor requirements would affect fire protection districts if a construction or improvement project falls within the scope of the Act’s definition of a public works project. Therefore, a fire protection district should be aware of the requirements of the Act and carefully review any construction contracts to ensure compliance with the revised legislation. ■

PSEBA and the Orland Fire opinions: an update

by Shawn P. Flaherty

Readers of *Legal Insights* should recall an article in our Winter 2010 edition written by Brian O’Connor which detailed conflicting appellate court decisions rendered by the Illinois Appellate Court for the First District concerning eligibility for lifetime paid health insurance under the Public Safety Employee Benefits Act (PSEBA). Both cases concerned claims for PSEBA benefits made by Orland Fire Protection District firefighters who suffered catastrophic injuries while participating in training evolutions. In one case, *Gaffney v. Board of Trustees of the Orland Fire Protection District*, 397 Ill.App.3d 679 (1st Dist. 2009), the First District court held that the firefighter was not entitled to PSEBA benefits. A few weeks later, the Court ruled in a second case, *Lemmenes v. Orland Fire Protection District*, 399 Ill.App.3d 644 (1st Dist. 2010), in favor of permitting the firefighter to receive PSEBA benefits under the facts presented.

Certain parties involved in the *Gaffney* and *Lemmenes* cases filed petitions for leave to file appeals before the Illinois Supreme Court. On May 26, 2010, the state’s highest court granted leave to appeal both decisions and consolidated the cases for appeal. As this is a matter of great interest to public employers and public employees alike, it is not surprising that several organizations have filed *amicus curiae* briefs in support of the parties in this proceeding. The Illinois Municipal League, the Illinois Fire Chiefs Association, and the Illinois Association of Fire Protection Districts were among the parties who filed briefs in support of the Orland Fire Protection District. The Associated Firefighters of Illinois is among the parties in support of the two employees.

The cases have been set for oral argument on November 17, 2010. An opinion should be issued early next year. ■

Probationary Period

Continued from page 2

performing the job of a firefighter, it would have used the phrase “performed the job” instead of “held that position.”

As a result of this decision, employers may no longer extend the probationary period beyond one year when probationary firefighters are absent for a significant portion of their first year of employment. Unfortunately, the alternative to extending the probationary period is to simply terminate the probationary firefighter who is absent for a significant time in his or her first year.

It is important to note, however, that the Public Employee Disability Act (5 ILCS 345/1 *et seq.*), the Illinois Workers’ Compensation Act (820 ILCS 305/1 *et seq.*), and Article 4 of the Illinois Pension Code (40 ILCS 5/4-101 *et seq.*) may protect an injured employee’s job when the injury occurs on duty. Caution should be exercised when contemplating the discharge of a firefighter injured on-duty who is entitled to salary continuation under the Public Employee Disability Act, or has either a pending workers’ compensation claim or a pending application for a line-of-duty disability pension. ■

“Fireman’s Rule”

Continued from page 1

The trial court granted summary judgment in favor of the Leonards, holding, not only that the fireman’s rule applied, but that the defective stairway was an “open and obvious” hazard that Rusch should have seen and been able to avoid. The appellate court disagreed on both grounds and reversed the trial court’s ruling.

First, the court determined that the fireman’s rule did not apply because Rusch was not injured as a result of the incident that necessitated his call to the property, the patient’s fall from the attic to the second floor. Rather, he was injured by the stairway, which was independent of the reason Rusch responded to the Leonard’s property.

Next, the appellate court considered the trial court’s ruling that the defective stairway was an open and obvious hazard, barring Rusch’s claim. Here, the appellate court invoked an exception to the open and obvious rule called the

“deliberate encounter exception.” This exception applies when a reasonable person would encounter the open and obvious hazard only because the advantage of doing so would outweigh any risk created by the hazard. At the Leonard’s property, the stairway was the only way to move between the first and second floors. The court held that, even if the stairway’s dangers were open and obvious, Rusch had to traverse the stairway to transport the patient to a hospital, and therefore, the open and obvious rule did not apply.

Although the courts have limited emergency responders’ ability to sue property owners for injuries incurred in response to emergencies, there is not an absolute bar. When the cause of the injury is not related to the emergency response, and is of the type that an ordinary person would face in entering the property, an emergency responder has a legal remedy available. ■

The “Fireman’s Rule” limits a firefighter’s ability to sue a property owner when injured responding to an emergency call.

Ottosen Britz Kelly Cooper & Gilbert, Ltd.’s newsletter, *Legal Insights for Fire Protection Districts*, 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:

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