

Volume 25, No. 1 -- Spring 2018

Firefighters in military service and their legal rights

by Brian J. O'Connor

Firefighters possess and routinely display a selfless dedication to service and others while sharing a close comradery with their peers. These are the very same traits of members of the military services. It is small wonder, then, that many firefighters are veterans and some even continue their military careers while also serving as firefighters. This shared path of service is not without its challenges, both for the firefighter, as well as their fire district administrators.

Administrators need to be aware of three broad categories of rights when considering firefighters concurrent with military service:

- Employment (including non-discrimination, hiring preference, promotional preference, time off for military service, and pay during military service);
- Reemployment; and
- Continuation of benefits during military service (such as seniority or other entitlements, pension participation, and health insurance participation).

These three categories are governed by various federal and state laws and regulations. Employee benefits provided by these various laws are protected. A firefighter believing a violation of his or her benefits may, by law and regulation, seek recourse in federal or state courts and/or with federal or state agencies.

Applicable Laws

There are one federal and six state "major" laws relating to protections afforded to firefighters during periods of military service. The federal law is the Uniformed Services Employment and Reemployment Rights Act

("USERRA", 38 U.S.C. 4301 *et seq.*). The principal State laws include: the Human Rights Act (775 ILCS 5/1-101 *et seq.*); the Military Leave of Absence Act (5 ILCS 325/0.01 *et seq.*); the Local Government Employees Benefits Continuation Act (50 ILCS 140/1 *et seq.*); the Public Employee Armed Services Rights Act (5 ILCS 330/1 *et seq.*); the Service Member's Employment Tenure Act (330 ILCS 60/1 *et seq.*); and the Municipal Employees Military Active Duty Act (50 ILCS 120/0.01 *et seq.*).

The take-away for administrators is that there are a number of laws, some with corresponding regulations, addressing protections afforded to firefighters related to periods of military service. If a situation arises, contact your legal counsel for guidance.

Employment Protections

There are several employment-related protections for firefighters of which administrators should be generally aware.

Nondiscrimination - The fire district or department cannot discriminate against the firefighter based on military service or status.

Hiring preference - An applicant who is a veteran may be entitled to hiring preference. Note that *generally* to be eligible the applicant would have needed to have at least one year of active, honorable service. This would be documented in discharge papers the applicant would have and should supply to document eligibility.

Continued on page 2

The PAC's greatest hits of 2017

by John E. Motylinski

While the courts are important in defining the meaning of the Freedom of Information Act ("FOIA") (5 ILCS 140/1 *et seq.*) and the Open Meetings Act ("OMA") (5 ILCS 120/1 *et seq.*), the Illinois Attorney General's Public Access Counselor ("PAC") is also a major force in interpreting these statutes. Indeed, just like the courts, the PAC issues binding written opinions on proper compliance with FOIA and OMA that must be heeded. The three most informative and significant PAC decisions of 2017 are analyzed below to help fire protection districts keep abreast of their obligations under these sunshine laws.

FOIA: Taylorville Sanitary District

The Taylorville Sanitary District matter revolves around whether redacting financial information on public records is proper. The District received a FOIA request for copies of contracts with its wastewater treatment vendor. The District disclosed these documents, but redacted the substantive financial terms of its contracts, such as the amounts billed to the District, annual budgets submitted by the vendor, and invoices. However, the District did not provide the FOIA requestor a reason why it was redacting those materials. Accordingly, the requester filed a request for review with the PAC, seeking unredacted copies of the documents.

On review, the PAC found that the District violated FOIA by not explaining the factual basis for redacting the records. However, the PAC considered the District's argument that the vendor financial records

Continued on page 4

Firefighters in military service

Continued from page 1

Promotional preference - In addition to a benefit for initial appointment, a firefighter may be entitled to a promotional preference. The promotional preference is *generally* a one-time preference, where that preference is used only if a candidate having received military preference is promoted from that list.

Time off for military service - A firefighter must be given time off for military service. The firefighter must be allowed sufficient time for travel to the military service location and with sufficient time off prior to travel to allow the firefighter to arrive rested to perform the military service. Similarly, the firefighter should be scheduled to return to work only after time for travel and recovery from the military service. Also note that the firefighter *cannot* be required to use paid time off to attend military service.

Pay during military service - A firefighter is *generally* entitled to pay during military service; the amount of pay depends on the type of military service. The *general* rule is that a firefighter is entitled to the difference between his or her normal district compensation less the "military base pay" received. The exception is for a firefighter during "annual training" during which time the firefighter continues to receive his or her normal fire district or department compensation in addition to any military pay. Administrators need to confirm the type of military service being performed by the firefighter which is identified on the firefighter's military orders. Also, the firefighter should submit military pay documents for periods of military service to confirm the applicable "military base pay" which is essential for calculating differential pay.

Reemployment -- Firefighters are entitled to reemployment on request after completing military service with the same status and benefits as a co-worker who was present for the period of military service. This situation does not usually become problematic for short weekend drill or multi-week annual

training military service periods. It can be a major factor for longer term deployments.

Firefighter notice to district/department of pending military service – Firefighters seeking these employment benefits must give the district or department advance written or verbal notice of such pending military service (USERRA 38 U.S.C. 4312(a)(1)). Note however, that the requirement for notice may be waived if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable (USERRA 38 U.S.C. 4312(b)). The determination of military necessity is made pursuant to regulations prescribed by the Secretary of Defense, not the firefighter.

Advance and continuing notice by the firefighter to the fire district or department is also needed to validate the firefighter's "military base pay" for the period of military service, ranging from the weekend drill day up through multi-month deployments.

Continuation of Benefits

Firefighters' eligibility for benefits continues during military service - Several federal and state laws address this protection. While aspects of the continuation of benefits do not usually become problematic for short weekend drill or multi-week annual training military service periods, they can present administrative challenges for longer term deployments.

Pension participation - Firefighters may be entitled to apply for pension credit for military service which occurred before or during employment, but the applying firefighter will *generally* be required to contribute (pay) for any such claimed credit.

Health insurance participation - Firefighters and their families are eligible to continue health insurance coverage analogous to continuation under COBRA.

Conclusion

If your fire district or department has a firefighter who has been alerted for military service, either short or long duration, it would be prudent to consult with legal counsel and finance/accounting to ensure compliance with all laws. Laws passed by Congress and the Illinois General Assembly, and regulations implemented by a host of federal and state agencies, provide a variety of venues for relief for a governmental employee performing military service who is improperly treated or discriminated against. Checking with advisors assists the unit of government in avoiding the diversion of time, effort and costs from an oversight. ■

*Visit our Hospitality
at the
IAFPD Conference*

Friday, June 22, 2018
5:00 p.m. - 7:00 p.m.



*Cheminee Ballroom
Peoria Marriott Pere Marquette*

New method to annex “no man’s land” enacted

by Shawn P. Flaherty

A “no man’s land” is defined as “an indeterminate or undefined place or state” or alternatively, as “an area that is unowned, uninhabited, or undesirable.” A cursory review of county fire protection maps shows several parcels of property that are neither contained within the borders of a fire protection district nor a municipality that provides fire protection services. These properties usually are the result of the farm or property who opted out of joining a fire protection district when it was initially formed by referendum and court order.

Some of these “no man’s land” are public land or rights of way containing little in value for a fire protection district. Others have been developed into residential or commercial interests that are best protected for fire and emergency services by being annexed into the boundaries of a municipality or fire protection district.

Several owners of these parcels have not cooperated with attempts to annex into a fire protection districts, as they have been content to accept fire protection services for free, while paying nonresident rates for ambulance service. This situation was identified as inequitable, and legislation was introduced aimed at correcting this discrepancy.

On November 9, 2017, the Illinois General Assembly overrode Governor Bruce Rauner’s veto, thereby enacting Public Act 100-547 into law effective on January 1, 2018. This law creates Section 3.3 of the Fire Protection District Act (70 ILCS 705/3.3) and provides a streamlined method whereby a board of trustees of a fire protection district may annex property in a “no man’s land” under prescribed circumstances which include notice to the property owner, certification from the dispatch agency, and adoption and filing of an annexation ordinance.

Section 3.3 permits a fire protection district to annex “property for which the district is providing coverage under Section 10.2 of the Emergency Telephone System Act” by

adopting an annexation ordinance. A fire protection district would be well served by obtaining an affidavit and other proof from its dispatch center certifying that the property sought to be annexed is assigned to the fire protection district for emergency calls. Without such a certification, the annexation under this section is subject to attack.

Assuming that the fire protection district is able to secure the affidavit of service from the dispatch provider, the remaining annexation steps of Section 3.3 are straightforward:

- Prepare an annexation ordinance containing the legal description and Property Identification Number (PIN) of the property to be annexed;
- Set a date for a public hearing on the annexation;
- Provide at least 20 days, advance notice via certified mail to the property owner of the date, time, and location of the public hearing;
- Include the public hearing and adoption of the annexation ordinance on the agenda of the board meeting;

- Hold a public hearing on the annexation. You are required to allow the impacted property owners or other interested parties to be heard on the matter;
- Adopt the annexation ordinance;
- File the annexation ordinance with the County Clerk, the OSFM, and the impacted property owners; and
- Although not statutorily required, we recommend you record a copy of the annexation ordinance with the County Recorder and provide a copy of this document to the county map department and county tax extender.

The primary advantage of this new law is that the property owners cannot easily say “no” to the annexation of their unprotected properties. Our firm has assisted several clients in identifying “no man’s lands” within or outside of their borders, and we are assisting these clients in adding these properties on to their tax rolls for the 2018 tax year payable in calendar year 2019. If your district has any “no man’s lands” that require annexation, you should consider saying “yes” to annexing them under this new procedure. ■

DID YOU KNOW?

Ottosen Britz does not just specialize in rendering legal services to municipalities, fire protection districts, pension boards and school boards; Ottosen Britz also offers vast experience in the following legal fields:

- Estate planning, which includes the preparation of wills, trusts and powers of attorneys;
- Estate and trust administration;
- Real estate, which includes purchases and sales of residential and commercial real estate, landlord-tenant disputes and leasing of residential and commercial properties;
- Business formation and succession planning; and
- General civil and commercial litigation.

If you have a question about a legal issue involving these areas of law, Ottosen Britz has an attorney who can assist you.

PAC's greatest hits

Continued from page 1

were exempt from disclosure under Section 7 (1)(g) of FOIA - the "trade secrets" exception. Under this exception, trade secrets or confidential business information need not be disclosed when they are obtained from a third party whose business would be harmed if the information were to be released.

The District tried to argue that there was a confidentiality agreement in place between the vendor and the District that covered the pricing information in the sought-after records, and therefore the trade secrets exemption should apply. The PAC disagreed, finding that the confidentiality clause was trumped by FOIA. The information at issue directly related to the use of public funds by the District, and Illinois public policy has long recognized these types of records should be freely available for public inspection. Therefore, the trade secrets exemption did not apply, and the District was ordered to turn over unredacted records.

In summary, even though disclosing vendor contracts may be uncomfortable at times, the PAC has made clear that these types of records must be disclosed in full where no other exemption applies.

FOIA: McLean County

The McLean County matter answers the question of whether FOIA requests about the existence of other FOIA requests are proper. In September 2017, the *Bloomington Normal News* submitted a FOIA request to McLean County for all FOIA requests received within the last eight weeks and the County's responses. McLean County denied the request, stating that the request did "not meet the purpose and intent of FOIA." The denial was appealed to the PAC, which held that McLean County must produce the requested records.

At the outset, the PAC noted that the County did not cite a specific exemption under FOIA for not complying with the request. Furthermore, the County did not contend that the responsive documents were not public records subject to FOIA. Because all public

records are presumed to be subject to disclosure unless an exemption applies, the County should have turned over the information. The County attempted to argue that it could not disclose the FOIA requests and responses because doing so would constitute an unwarranted invasion of personal privacy for the other FOIA requesters. The PAC debunked this argument, noting that the County could have easily made proper redactions if necessary.

Although FOIA requests about other FOIA requests may seem improper, the PAC has made it clear that they are acceptable and must be complied with—assuming no other exemption applies.

OMA: Village of Mapleton

The Village of Mapleton PAC decision concerns whether the conduct of board members may be considered in closed session. In the Mapleton case, one of the members of the Board of Trustees of the Village of Mapleton made racist comments during a prior board meeting. A few months later, the Village Board adjourned to closed session to discuss the conduct of the board member, citing the "personnel" exception.

An aggrieved member of the public filed a request for review with the PAC, arguing that this topic should have been discussed in open session. The PAC agreed. First, the PAC noted that the personnel exception is limited to discussing the "appointment, employment, compensation, discipline, performance, or dismissals of specific employees of the public body . . ." However, elected officials are not "employees" of a public body; rather, they are occupants of public office. Therefore, the personnel exception did not apply.

The PAC went on to consider the Village's second argument that, even though it did not cite the exception at the time, it was authorized to go into closed session because OMA Section 2(c)(3) authorizes the

discussion of the "discipline, performance or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance." The PAC noted that there was no law or ordinance that would allow Village Board members to remove a fellow trustee. Consequently, this exception also could not apply. Thus, the Board should have discussed the conduct of the implicated member in open session.

Like the Village Board of Mapleton, fire protection district trustees have no ability to remove fellow trustees for cause. Therefore, any discussion of the conduct of trustees must be done in open session. ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, 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:

**OTTOSEN BRITZ KELLY COOPER
GILBERT & DINOLFO, LTD.**
1804 North Naper Boulevard, Suite 350
Naperville, Illinois 60563
630-682-0085
www.ottosenbritz.com
Shawn Flaherty, Editor
sflaherty@ottosenbritz.com

Copyright 2018 by
**OTTOSEN BRITZ KELLY COOPER
GILBERT & DINOLFO, LTD.**
All rights reserved.

Pursuant to Rules 7.2-7.4 of the Illinois Rules of Professional Conduct, this publication may constitute advertising material.

