LEGAL INSIGHTS
FOR FIRE PROTECTION DISTRICTS
OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

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Notable recent legislation impacting Illinois Fire Protection Districts

by Shawn P. Flaherty

One of the primary impacts of the November 6, 2018 General Election is that the voters of the State of Illinois have returned state government to one-party control after four years of a Republican governor. The 100th Illinois General Assembly has ended, but that legislature managed to pass several new pieces of legislation impacting fire protection districts, including a few bills passed over ex-Governor Bruce Rauner's veto. Below is a summary of recent legislation that impacts fire protection districts:

Enhanced Legal Benefits for Full-time Paramedics

The Illinois Public Labor Relations Act (5 ILCS 315/3) has been amended to add "paramedics employed by a unit of local government" to the definition of "firefighter". This change will allow non-firefighting paramedics employed by a fire protection district to avail themselves of interest arbitration and other labor relations rights enjoyed by commissioned full-time firefighters**. P.A. 100-1131 (Eff. 11/28/18).**

The Public Safety Employee Benefits Act ("PSEBA") (820 ILCS 320) was amended to include "paramedics employed by a unit of local government" in the definition of "firefighters" who are potentially eligible for paid health insurance premiums and educational awards under PSEBA. Also included in the definition of eligible "firefighters" are emergency medical technicians holding an EMT, EMT-I, or A-EMT license and who are employed by a unit of local government. This is an expansion of PSEBA benefits but a fairly limited one. **P.A. 100-1132 (Eff. 11/28/18).**

The General Assembly overrode the Governor's veto in adopting an amendment to the Public Employee Disability Act ("PEDA") (5 ILCS 345/1) into law. The term "eligible employee" was expanded by this amendment to include full-time paramedics or firefighters who perform paramedic duties as persons who may be eligible for the disability benefits provided by PEDA. **P.A. 100-1143 (Eff. 1/1/19).**

Employment Matters

The Illinois Municipal Code and Fire Protection District Act were both amended to clarify the requirements that a full-time fire chief or department head must hold in order to serve as head of a fire department for more than 180 days. Clarifications to the previous language were made to allow for both military and out-of-state firefighter service to meet the qualifications to serve in this role. Home rule municipalities were also now included in this legislation. **P.A. 100-1126 (Eff. 1/1/19).**

The Governmental Severance Pay Act was created which will impact any contract or employment agreement entered into between a unit of local government and any "officer, agent, employee or contractor." The Act caps the

Continued on page 4

Supreme Court extends reach of ADEA to small fire protection districts

by John E. Motylinski

On November 6, 2018, the United States Supreme Court unanimously ruled that the Age Discrimination in Employment Act ("ADEA") applies to *all* local governments—no matter the number of people they employ. This ruling upends well-established caselaw holding that the ADEA only applies to state and local governments with at least twenty employees. Accordingly, fire protection districts—and potentially individuals accused of age discrimination—will now face greater hurdles in defending age discrimination claims.

Under the ADEA, an "employer" is prohibited from discriminating against a person because of his or her age with respect to any term, condition, or privilege of employment. This includes using age as a basis for hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

Originally, the ADEA applied only to private employers. In 1974, however, Congress expanded the definition of the word "employer":

> The term 'employer' means person engaged in an industry affecting commerce who has twenty or more employees. . .The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State. (29 U.S.C. §630(b))

Continued on page 2

Age discrimination

Continued from page 1

The confusing language of this statute has vexed courts for decades. The majority of federal courts of appeals—including the Seventh Circuit (covering Illinois, Wisconsin, and Indiana)—maintained that this expanded definition meant that a local government must have at least twenty employees before the protections of the ADEA were triggered. A minority of federal courts held that the definition of "employer" contains two independent clauses, meaning that local governments are always subject to the ADEA no matter their size.

This dispute came to a head in the recent U.S. Supreme Court case of *Mount Lemmon Fire District v. John Guido,* 2018 WL 5794639. The Mount Lemmon Fire District (a political subdivision of the State of Arizona) laid off its two oldest full-time firefighters due to a budget crisis. The firefighters sued the Fire District, alleging that their termination violated the ADEA. The Fire District asserted the majority view that it was not an "employer" under the ADEA because it did not have at least twenty employees.

The federal district court agreed with the Fire District and dismissed the case. The firefighters appealed to the United States Court of Appeals for the Ninth Circuit. In June 2017, the Ninth Circuit reversed and held that the age discrimination suit should proceed because the Fire District *was* an "employer" under the ADEA, even if it did not have twenty employees.

Although the U.S. Supreme Court granted the Fire District's request to review the case, it ultimately ruled against it and found that *all* local governments—no matter how large—are subject to the ADEA's ban on age discrimination.

In reaching its decision, the Court first rejected the Fire District's argument that the ADEA should be interpreted in a manner similar to Title VII, which is another federal statute prohibiting discrimination against employees on the basis of race, color, religion, sex and national origin. Although Title VII only applies to employers with fifteen or more employees—regardless of whether the employer is private or public—the Supreme Court was persuaded that Congress intentionally chose to give the ADEA and Title VII different requirements as evidenced by their diverse language.

Second, the Court found that the "also means" language in the ADEA's definition of "employer" added new entities subject to the law, including all states and political subdivisions. The Supreme Court reached this determination, in part, because the phrase "also means" appears "dozens of times throughout the U.S. Code," and typically carries an "additive" meaning.

Third, the Court was not persuaded by the Fire District's argument that the expansion of the ADEA to include all local governments would risk "curtailment of vital public services such as fire protection." The Court observed that many states (including Illinois) have their own laws forbidding age discrimination by political subdivisions of any size. The Court also noted that the Equal Employment Opportunity Commission ("EEOC") has used the same expanded definition for approximately thirty years. Therefore, the Court was not concerned that its ruling would have adverse practical ramifications.

The Court's holding in *Mount Lemmon* now subjects small Illinois fire protection districts (and other small local governments) to federal liability for age discrimination. Although the Illinois Human Rights Act already prohibits these entities from discriminating against employees on the basis of age, there are some key differences in the way the ADEA functions. For instance, the ADEA provides additional restrictions on waiving and releasing age discrimination claims. Indeed, to settle an ADEA claim, employees must be afforded twenty-one days to review any proposed settlement agreement. They must also be given seven days to revoke it after such an agreement is executed. Furthermore, ADEA charges may be filed with the EEOC rather than the Illinois Department of Human Rights.

Moreover, the Court's reasoning in *Mount Lemmon* also arguably opens the door to future lawsuits against allegedly discriminating individuals. Recall, the ADEA's definition of "employer" also includes "any agent" of the employer. Given the Court's holding that this clause is "additive" instead of clarifying, the Court may have created a cause of action against individual employees accused of discrimination.

Therefore, the *Mount Lemmon* decision will have direct consequences for small Illinois fire protection districts—and potentially individuals, as well. Accordingly, if your district experiences any age discrimination problems, it is vital that counsel become involved as soon as possible. ■

Pointers on preference points

by Joseph Miller III

Statutes providing veteran preference are entrenched in our nation's civil service history. For example, the Civil Service Act of the early 1900s provided that persons who had served in the armed forces during the Civil War, and were honorably discharged, should be preferred for appointment to civil service positions provided that they possessed the proper qualifications for such positions.

Currently, there are several statutory provisions governing preference points. With many uses of these points, it is important to look at the different statuses that are afforded preference. Specifically, statutory requirements for preference in initial hiring differ greatly from the requirements attached to the promotional process.

Section 16.06(h) of the Fire Protection District Act (70 ILCS 705/16.06 (h)) outlines the possible preferences to be considered in initial hiring. These preferences include veteran preference, educational preference, experience preference, fire cadet preference, paramedic preference, and residency preference. These categories allow a pool of applicants to qualify for initial hiring points.

For a promotional exam, *only* veterans receive preference points. Because the Illinois Fire Protection District Act is silent on veteran preference points for promotional exams, we must look to the Illinois Municipal Code for guidance. Under the Board of Fire and Police Commissioners provisions in the Illinois Municipal Code, veterans "receive as a result of any promotional examination 7/10 of one point for each 6 months or fraction thereof of military or naval service not exceeding 30 months." (65 ILCS 5/10 -2.1-11). Thus, a veteran who has 30 months of service can earn up to 3.5 points. This differs from the veteran's preference points for initial hire. For initial hire, a veteran receives five points.

There has been much debate as to how a Commission should apply the veteran's preference points. Is a candidate restricted to only receiving points for each full six months of service or could a candidate have the points prorated for each day of military service? Recently, an arbitrator ruled that candidates are entitled to receive fractions of points proportionate to their time of military service. Consequently, a candidate who served for 9 months is entitled to a proportional amount of points even though the candidate falls short of the 12-month period specifically outlined in the statute. In this example, a candidate would be entitled to 1.05 points rather than just 0.7 points for six months of military service. In ruling, the arbitrator noted that the language in the statute provides for consideration of a "fraction thereof" of military service. (65 ILCS 5/10-2.1-11).

Another interesting facet of preference points is that the application of promotional preference points may be bargained in a collective bargaining agreement. It may be beneficial to have an agreement addressing preference points in order to clearly outline the District's and Commission's application of these preference points for upcoming promotional exams. ■

Ottosen Britz to Present at the NIAFPD Conference

The Northern Illinois Alliance of Fire Protection Districts will host its annual conference on January 24-27, 2019 at the ***Oak Brook Hills Resort & Conference Center***. Presentations by our firm will include:

Thursday - January 24, 2019 ~ ***John Motylinski -*** "Unusual Benefit Issues for Tier 1 and Tier II Firefighters." ***Carolyn Clifford*** - "Setting Actuarial Assumptions: Understanding the Professional and Fiduciary Responsibilities."

Friday - January 25, 2019 ~ ***Meganne Trela & Joshua Rosenzweig*** - "Challenges of an Aging Pension Fund Membership." ***Karl Ottosen*** - "Wearing Your Trustee Hat: Understanding Your Relationships with Administration and Other Officials in Your District." ***Steve DiNolfo*** - "Hiring Considerations in Selection of Your Next Fire Chief." ***Carolyn Clifford*** - "Pros and Cons of Pension Fund Consolidation." ***Shawn Flaherty*** - "Taking Action Against Cancer in the Fire Service Part I & II."

Saturday - January 26, 2019 ~ ***Robert Steele, Jr.*** - "Evolving Issues in Hiring Firefighters." ***Karl Ottosen*** - "Collective Bargaining and Interest Arbitration: The Good, The Bad and the Ugly." ***Joe Miller*** - "Trustees Say the Darndest Things." ***Ericka Thomas*** - "#MeToo Movement and the Fire Service." ***Shawn Flaherty*** - "Elements of a Successful Referendum." ***Steve DiNolfo*** - "Health and Wellness Issues in Hiring and Employment of Firefighters."

Visit our Hospitality ~ Saturday, January 26th ~ 5:00 p.m. to 7:00 p.m. ~ Lobby Bar / Tiers Area

Recent legislation

Continued from page 1

amount of severance pay that may be paid to 20 weeks of compensation and prohibits the provision of severance pay when the officer, agent, employee, or contractor has been fired for misconduct as greater defined in the new Act. Nothing in the new Act creates any entitlement to severance pay in the absence of its contractual authorization or law. **P.A. 100-0895 (Eff. 1/1/19).**

The Local Records Act (50 ILCS 205) was amended to require the reporting of severance agreements entered into between units of local government and an "employee or contractor" when sexual harassment or discrimination has occurred. Certain severance agreements must now publish information about the severance agreement including names, titles, and payment sums on the internet within 72 hours of the approval of the severance agreement. (50 ILCS 205/3c(a)). However, this Act is fairly ineffectual in that it contains four exemptions from public disclosure which would seem to apply in many instances. **P.A. 100-1040 (Eff. 8/23/18).**

The Illinois Wage Payment and Collection Act has been amended to require employers to "reimburse an employee for all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer." (820 ILCS 115/9.5). Observers of this legislation have noted that this reimbursement would be sure to apply to the usage of personal cellphones and home internet expenses for work-related calls and business. Necessary expenses are those "reasonable expenditures or losses required of the employee in the discharge of his or her employment and which primarily benefit the employer." Employees are required to submit requests for reimbursement with appropriate supporting documentation (or signed statement) within 30 calendar days after incurring the expense. Employers are allowed to establish written policies on expense reimbursement that set forth the parameters under which reimbursements shall be made. The employer is not required to reimburse an employee for losses or expenses due to employee negligence, theft, normal wear or when the employer's written reimbursement policies are not adhered to. **P.A. 100-1094 (Eff. 1/1/19).**

Procurement

An amendment to the Local Government Professional Services Selection Act (50 ILCS 510/8) has been passed that would allow units of local government to waive the requisite public hearing, evaluation and selection criteria process for the hiring of architects, land surveyors and engineers for certain smaller sized projects. The dollar threshold for waiving the Act's requirement has been increased from $25,000 to $40,000, and an annual percentage multiplier tied to the federal Consumer Price Index-Urban unadjusted percentage increase was added. **P.A. 100-0968 (Eff. 1/1/19).**

OSFM Oversight

The Office of the Illinois State Fire Marshal (OSFM) has been provided with expanded authority and responsibility in performing necessary fire inspections for licensing requirements of Community-Integrated Living Arrangements (CILAs), while local jurisdictions retain authority to conduct local code inspection and enforcement functions and fire incident planning activities. **P.A. 100-0593 (Eff. 6/22/18).**

In an amendment to the Illinois Fire Protection Training Act (50 ILCS 740/2), the OSFM is required to reimburse local governmental agencies and individuals participating in firefighter training programs in an amount equaling one-half of the total sum paid during the period established by the OSFM for tuition, salary, travel expenses, and room and board, subject to appropriations. Other minor changes were implemented. **P.A. 100-0600 (Eff. 1/1/19).**

Additional progressive legislative developments are expected from the 101st General Assembly. Fire protection district leaders should remain proactive in the legislative process and continue to nurture positive relationships with local legislators whenever possible. ■

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:

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