

LEGALINSIGHTS

FOR PENSION BOARDS

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Court upholds pension board's determination that firefighter's latex allergy is not disabling

by Laura A. Weizeorick

A recent decision by the Second District Appellate Court found a firefighter/paramedic's latex allergy, which had rendered her unfit for duty, did not meet the more stringent standard to obtain a disability pension.

In *Edwards v. Addison Fire Protection District Firefighters' Pension Fund*, 2013 IL App (2d) 121262, plaintiff Kim Edwards began her employment as a firefighter/paramedic for the Addison Fire Protection District ("District") in July of 2004. She advised the District that she had a latex allergy and was provided with nitrile gloves. She reported no problems with her allergy until approximately four years later. Although she had not missed any time from work because of her allergy, she reported an increasing severity in her allergic reactions in July 2008.

The latex gloves on the District's fire apparatuses and worn by most of her co-workers were causing hives and respiratory reactions for Edwards. In September of 2008, the District sent Edwards for three independent medical evaluations and informed her that she could not return to work until the latex situation was resolved. On October 16, 2008, Edwards sued the District for discrimination under the Illinois Human Rights Act.

In the meantime, two of the three doctors who examined Edwards opined that she should not return to full and unrestricted firefighter duties. They stated that any exposure to latex constituted a risk to Edwards, to the well-being of the people under her care, and to the other responders who may need to be redirected to intervene. Furthermore, due to the nature of her duties, pre-treatment with antihistamines were unacceptable as a form of protection for Edwards. The District notified Edwards that because no position would ensure an absence of latex, it had no option but to seek her termination.

Edwards submitted an application for a disability pension in January of 2009. Edwards described her disability as a latex allergy, worsening over the last two years due to repeated exposure to latex gloves on the District's ambulances and engines. The Board of Trustees of the Addison Firefighters' Pension Fund (the "Board") received into evidence the three independent medical evaluations that the District had obtained in 2008 to assess her fitness for duty, as well as records from Edwards' treating allergist, and three independent medical evaluations from Board physicians assessing whether or not she was permanently disabled.

Amendment removes discrepancy in benefits to surviving minor children of deceased firefighters

by Laura A. Weizeorick

On August 16, 2013, Governor Quinn signed Public Act 98-0391 into law, amending Section 4-114 of the Illinois Pension Code (40 ILCS 5/4-114), to correct a discrepancy in the amount of benefits paid to surviving minor children of deceased firefighters.

Previously, where a deceased firefighter left a surviving minor child, but no surviving spouse, the pension payable to the guardian for support and maintenance of the child was 12% of the salary attached to the deceased firefighter's rank. In contrast, upon the death of a surviving spouse of a deceased firefighter, the pension payable to the surviving minor child was 20% of the salary attached to the deceased firefighter's rank.

The amendment, which took effect immediately upon passage, eliminated this discrepancy. It raised the pension benefit for a surviving minor child of a deceased firefighter with no surviving spouse to 20%, placing it on par with the pension benefit paid to surviving minor children upon the death of a surviving spouse.

Surviving minor children are entitled to pension benefits until they reach the

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Statutory requirements for investment adviser and consultant agreements: A checklist for pension boards

by **Erica J. Thomas and Ashley Folk**

The Illinois Pension Code allows for pension funds to retain investment advisers or consultants to assist with the management of the fund's investments. However, the Code also sets forth several specific provisions that must be in these agreements.

Initially, it is important to understand that in order to qualify as an investment adviser under the Illinois Pension Code, the individual must be: (1) appointed by the fund's board of trustees as a fiduciary in writing; (2) granted the power to manage, acquire, or dispose of any asset of the fund; and (3) either be registered as an investment adviser under the federal Investment Advisers Act of 1940 or the Illinois Securities Law of 1953, a bank, or an insurance company authorized to transact business in Illinois. (40 ILCS 5/1-101.4)

When determining what to include in an agreement with an investment adviser or consultant, a pension fund's board of trustees must make sure that the agreement complies with the statutory requirements imposed by Illinois law. Under the Illinois Pension Code, the following requirements must be met when entering into an agreement with an investment adviser or consultant (40 ILCS 5/1-113.5):

- The agreement must include an acknowledgment in writing by the investment adviser/consultant that he or she is a fiduciary with respect to the pension fund. (40 ILCS 5/1-113.5(b)(1))
- The agreement must reference the board's investment policy and require the investment adviser/

consultant to act in accordance with the requirements of that policy. (40 ILCS 5/1-113.5(b)(2))

- The agreement must contain a full disclosure of direct and indirect fees, commissions, penalties, and any other compensation that may be received by the investment adviser/consultant, including reimbursement for expenses. (40 ILCS 5/1-113.5(b)(3))
- The agreement must require the investment adviser/consultant to update the disclosure of fees promptly after a modification of those payments or after an additional payment. (40 ILCS 5/1-113.5(b-5))
- The agreement must require the investment adviser/consultant to submit periodic written reports, on at least a quarterly basis, for the board's review at its regularly scheduled meetings. (40 ILCS 5/1-113.5(b)(4))
- If the agreement is for investment consultant services, it cannot be for a term greater than five (5) years. (40 ILCS 5/1-113.5 (a-5))

In addition, the following additional considerations should be kept in mind when entering into these agreements:

- The agreement should be reviewed by the investment adviser/consultant, the treasurer of the pension fund, and the pension fund's attorney.

- The agreement should only create the potential for liability for trustees only in their capacities as trustees, but not in their individual capacities.
- If the agreement contains a choice of law provision, it should require enforcement under Illinois law.

The decision of who to hire to invest a pension fund's assets is a crucial element to the management of a fund. The components of the contractual relationship with the investment adviser or consultant are equally important, and thus boards should make sure any agreement is carefully reviewed before it is signed by the trustees. ■



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Who is a “Municipal Adviser” under the SEC’s new rule?

by Meganne Trela and Ashley Folk

The United States Securities and Exchange Commission (SEC) recently passed the “Municipal Adviser Rule,” which establishes certain registration requirements for municipal advisers. The new rule requires municipal advisers to permanently register with the SEC if they provide advice to municipalities regarding issuance of municipal securities or certain investment strategies. For example, a municipal adviser may be an individual who assists state and local governments with management of its municipal bonds by providing guidance on when and how to issue securities or how to invest the proceeds from selling these types of municipal bonds. However, providing advice on “investment strategies” has been limited and does not apply to advice relating to all public funds. The term “investment strategies” applies to any advice related to the proceeds from the sale of municipal securities.

A concern that arose after the rule was formulated was the determination of who would actually qualify as a municipal adviser, and thus be subject to the SEC’s registration requirements. Specifically, in the context of pension funds, there was a concern whether trustees of pension boards and investment advisers of pension funds are subject to these registration requirements under the Municipal Adviser Rule. The SEC has issued guidance on these issues.

There are three main types of municipal advisers: (1) financial advisers, such as brokers and dealers of municipal securities, who provide advice to municipalities in regards to the municipalities issuance of municipal securities and use of municipal financial products; (2) investment advisers who

advise municipal entities on the investment of the proceeds of municipal securities; and (3) third-party marketers and solicitors who solicit municipalities on behalf of security brokers.

To provide further clarity, the final rule outlines the exemptions from the definition of a municipal adviser. For example, a trustee on a pension board would not be subject to the registration requirements of the Municipal Adviser Rule. Trustees are covered under the exemption provided for public officials and employees of the municipality. Thus, trustees acting within their official capacity on the board are not obligated to register with the SEC under the Municipal Adviser Rule.

The final rule also provides an exemption for registered investment advisers. If an investment adviser has registered under the Investment Advisers Act of 1940 and is providing advice to a municipality relating to the investment of municipal securities or municipal escrow investments, that individual is not subject to the registration requirements of the Municipal Adviser Rule. Additionally, this exemption also covers any associated persons to registered investment advisers.

However, investment advisers are still required to register with the SEC under the Municipal Adviser Rule in limited situations. The exemption does not apply to any investment advice relating to the structure, timing, and terms of issuance of municipal securities or municipal derivatives. Thus, an investment adviser who provides advice concerning these topics would still be

required to register under the SEC even though they have already registered under the Investment Advisers Act.

The registered investment adviser exemption under the Municipal Adviser Rule is applicable to investment advisers of police and fire pension funds. Under Section 1-101.4 of the Illinois Pension Code, an investment adviser to a pension fund must either be registered under the federal Investment Advisers Act, be registered under the Illinois Securities Law of 1953, be a bank, or be an insurance company authorized to transact business in the State of Illinois (40 ILCS 5/1-101.4). As previously noted, the Municipal Adviser Rule specifically exempts investment advisers who are registered under the federal Investment Advisers Act and who are not offering advice about the issuance or structure of municipal securities. However, the final rule does not reference comparable state laws, and it is therefore not as clear whether investment advisers to a pension fund who are registered under state law are offered the same protection under this exemption.

It is reasonable to conclude that as long as an investment adviser registered under state law is not offering advice on the issuance or structure of municipal securities, he or she will likely be excluded from the registration requirements imposed by the Municipal Adviser Rule. However, it is recommended that pension funds seek out or require their investment advisers to be registered under federal law rather than state law, since the exemption under the Municipal Adviser Rule specifically exempts the advisers who are registered under federal law. ■

Discrepancy in benefits

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age of 18 or marry. Pension benefits to surviving minor children with physical or mental disabilities continue for as long as the individuals remain dependent on their parent or guardian. For eligible surviving minor children receiving a 12% pension on the effective date of the amendment, the increase in benefits to 20% takes effect on the first pension payment date occurring on or following August 16, 2013. The increase applies without regard to whether the deceased firefighter was in service on or after the effective date of this amendatory Act. ■



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Court upholds pension board's determination

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Although two of the three Board physicians believed that Edwards might have a permanent disability, neither of them confirmed Edwards' allergy through any objective tests. In contrast, the third physician cited to numerous test results, which showed no proof of any measurable allergy to latex.

Moreover, one of the District's physicians noted that Edwards' respiratory symptoms were caused by exertion or her other non-latex allergies and not to her exposure to latex. By Edwards' own admission, her "disability" was unrelated to her ability to perform the essential functions of her job. In fact she had never missed any work because of her allergy until the District removed her from duty.

Finally, her sensitivity did not last for twelve months, nor was it expected to last for a continuous period of twelve months. The absence of a conclusive allergy result, coupled with her lack of disabling symptoms, caused the Board to conclude that her "sickness" had not rendered her "permanently disabled" under the Pension Code. The Board denied her disability pension.

Edwards filed a complaint for administrative review of the Board's decision and sought to consolidate her case with her civil action against the District for discrimination. The circuit court denied the motion to consolidate the two cases. It then concluded that the decision to deny benefits was not against the manifest weight of the evidence, nor clearly erroneous, and affirmed the Board's decision. Edwards appealed again, this time to the Second District.

The Second District, like the circuit court before, found no error in the Board's decision to deny Edwards a disability pension. To clarify the seemingly incongruous outcome - that a firefighter could be found unfit for duty because of a latex sensitivity and yet be found ineligible by the pension board for the infirmity - the court distinguished the differences in the two processes. It stated that while the District had to determine whether Edwards was capable of performing her job requirements without endangering herself or the general public, the Board was to determine whether Edwards' latex sensitivity rendered her permanently disabled and whether the nature of her disability required her to be placed on a disability pension.

Reaffirming *Dowrick v. Village of Downers Grove*, 362 Ill.App.3d 512 (2nd Dist. 2005), the court explained that given the compelling public interest in ensuring the fitness of firefighters to perform their duties, it is reasonable to conclude that the General Assembly deliberately set the bar lower for a municipality seeking to discharge an unfit firefighter than for a firefighter to obtain a disability pension. Note that as of the date of this publication, Edwards' discrimination case has not been resolved and is still pending in DuPage County Circuit Court. ■

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