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Appellate court clarifies labor contract “meeting of the minds”

by Thomas J. Gilbert

A recent decision from the Illinois Appellate Court for the Second District addressed several issues regarding the collective bargaining process which merit review. In *International Association of Firefighters Local 413 AFL-CIO v. The City of Rockford*, 2018 IL App (2d) 170318-U, a dispute arose between the City of Rockford and its firefighters' union regarding the city's attempted implementation of a provision requiring medical certification to be submitted by employees returning from sick leave. Prior to August 2011, the parties' collective bargaining agreement contained provisions governing the use of sick leave, which did not include any protocol for medical certification required upon return from leave. Additionally, the City's rules and policies featured independent requirements for sick leave.

On August 18, 2011, the City's Fire Chief issued a memo announcing intended changes to the sick leave policy. Specifically, the memo proposed additional medical certifications following sick leave. This was done in accordance with the collective bargaining agreement's established method for implementing new policies, which gave the union an opportunity to review the proposed policy prior to implementation and to file a grievance if deemed necessary. After analyzing the new sick leave changes, the union filed a grievance challenging the reasonableness of the policy. Meanwhile, the parties began the process of renegotiating their collective bargaining agreement. During the negotiations, the

parties appeared to put the grievance on the backburner, perhaps hoping to resolve the sick leave issue through the collective bargaining process.

During negotiations, the parties reached a tentative agreement on the medical certification issue and other unrelated matters. However, the city and the union disagreed as to whether the sick leave policy change was supposed to be included in the new collective bargaining agreement. The city later asserted that it was never its intent to include the medical certification part of the collective bargaining agreement. Rather, it wanted the medical certification portion of the collective bargaining agreement to remain a policy outside of the agreement. The union conversely thought that the medical certification provision was supposed to be incorporated into the new contract.

The tentative agreement addressing the medical certification issues eventually made its way to interest arbitration as part of the underlying contract negotiations (as opposed to the grievance arbitration process). The interest arbitrator made a ruling that incorporated all of the tentative agreements into a successor collective bargaining agreement. Thinking that the sick leave policy was mistakenly added to the interest arbitrator's successor agreement, the municipality submitted the proposed collective bargaining agreement without the provision pertaining to medical certification requirements and

Continued on page 3

The ABCs of AEDs

by Robert W. Steele, Jr.

The push for the increased use of automatic external defibrillators (“AEDs”) in schools, gyms, and other public facilities has grown, with increasing examples of people using AEDs to save the lives of stricken participants. The stories of successful AED use are numerous - from a quick-acting bystander using an AED to save a Naperville theatre patron's life, to athletic trainer Maddie Biehl's swift response to high school basketball player Kai Bates-Diop's cardiac event during practice. Yet across the state a rising concern exists for certain buildings that possess aging AEDs that have not received regular service or replacement.

As early as 2000, the State of Illinois began expanding its laws and regulations on the placement, use, and maintenance of AEDs. One of those laws is the Automated External Defibrillator Act (410 ILCS 4/1 *et seq*; the “AED Act”), which places a range of requirements on certain facilities, government agencies, and private business owners. Over the years, the AED Act has also continued to mirror federal “Good Samaritan” protections (42 U.S.C. § 238q) by creating explicit exemptions from civil liability. These exemptions mainly cover individuals and entities that train in the use of AEDs, properly trained users, and property owners as well as units of government with AEDs on their premises. 410 ILCS 4/30; *see also* 745 ILCS 49/12 “Good Samaritan Act”.

Since then, numerous events have shaped public awareness on AED use. In

Continued on page 4

Seventh Circuit dismisses federal civil rights claim related to firefighter discipline

by James G. Wargo

The Seventh Circuit Court of Appeals recently found that the Village of Melrose Park did not violate a firefighter's due process or equal protection rights when it terminated his employment for violating the Village's residency ordinance. *Cannici v. Village of Melrose Park*, 885 F.3d 476 (2018). The case further illustrates the legal principle that the availability of review under the Illinois Administrative Review Law of a board of fire and police commissioners' decision provides sufficient post-deprivation relief to defeat a federal due process claim by a terminated firefighter.

Plaintiff John Cannici was a firefighter employed by the Village of Melrose Park for sixteen years prior to his termination for violating the Village's residency ordinance. Pursuant to the ordinance, all employees were required to be Village residents and maintain such residency during the term of his or her employment. Cannici and his family initially lived in a house in Melrose Park. In 2008, Cannici purchased a second home in Orland Park while maintaining his Melrose Park home. After purchasing this second home, Cannici continued to live at the Melrose Park home during the week while his family lived in the Orland Park home.

In 2013, Cannici rented out the Melrose Park home. In an apparent attempt to maintain his residency in Melrose Park, Cannici reserved a portion of the home's basement for his exclusive use in the lease, kept certain belongings in the home, maintained access to the home, paid utilities and taxes for the home, and continued to use the Melrose Park address to receive his mail. However, Cannici reportedly primarily slept at his Orland Park home from 2013 to 2016.

In June 2016, the Village served Cannici with written charges for violating the residency ordinance. A hearing on these charges was then commenced before the

Village's Board of Fire and Police Commissioners ("Board"). At the hearing, Cannici asserted that since he had previously established residency in Melrose Park, Illinois law did not require him to maintain a physical presence in the Village as long as he had no intention of "abandoning residency." During the hearing, Cannici testified regarding the circumstances surrounding his decision to rent the Melrose Park home and that he never intended to abandon the home for residency. *Cannici v. Village of Melrose Park*, 262 F. Supp.3d 591 (2017). Upon the conclusion of the hearing, the Board found that Cannici had violated the residency ordinance by failing to maintain his residency status from 2013 to 2016 and terminated his employment.

Cannici then filed a lawsuit in state court challenging his termination. Cannici's complaint included a request for review of the Board's decision under the Illinois Administrative Review Act as well as two federal §1983 claims alleging a violation of his right to due process and equal protection under the United States Constitution. The Village defendants removed the case to federal court and filed several motions to dismiss.

In his complaint, Cannici argued that the "Board's decision mischaracterized his testimony, disregarded the evidence, and misapplied the law." He also argued that despite the fact that several other Melrose Park firefighters had a similar living arrangement to his own, he was the only firefighter charged with violating the residency ordinance. The federal district court dismissed the federal due process and equal protection claims and remanded the case back to state court for a ruling on the administrative review of the Board's decision. Cannici appealed the district court's ruling to the Seventh Circuit Court of Appeals.

The Seventh Circuit Court of Appeals affirmed the dismissal of both the due process and equal protection claims. In analyzing Cannici's due process claim, the court noted that there are two types of procedural due process claims, including claims based on "established state procedures" and claims based on "random and unauthorized acts of state employees." In order to sustain a due process claim under §1983, a plaintiff must allege "(1) deprivation of a protected interest, and (2) insufficient procedural protections surrounding that deprivation." In order to determine whether an individual has been afforded sufficient procedural protections, a court must first determine whether the claim is based on a deprivation of "established state procedures" or the "random and unauthorized acts by state employees."

Since the parties were in agreement that Cannici had a protected interest in his continued employment as a firefighter and the court's conclusion that his claim was based on the random and unauthorized conduct of the Board, the court noted that a "meaningful post-deprivation remedy" would defeat the due process claim. In affirming the district court's dismissal of the due process claim, the court noted that it has "found time and again that the Illinois Administrative Review Act provides sufficient post-deprivation relief." As such, Cannici was required to avail himself of the review process under the Illinois Administrative Review Act to review the Board's decision or demonstrate that such remedy is inadequate. In affirming the dismissal of the due process claim, the court reasoned that Cannici had not argued that he had not been afforded his rights under the Administrative Review Act or that the procedural protections under the Act were inadequate.

In analyzing the equal protection claim, the court noted that Cannici's claim was

Continued on page 3

Labor negotiations

Continued from page 1

announced that it would go forward with the policy regarding medical certification that it had previously announced. The union then filed a complaint with the Illinois Labor Relations Board alleging that the municipality committed an unfair labor practice when it attempted to implement a policy that was a change from the temporary agreement which was incorporated into the interest arbitrator's decision.

The Illinois Labor Relations Board sided with the city, finding that there was no real "meeting of the minds" with regard to this sick leave issue and therefore the municipality did not commit an unfair labor practice when it implemented the agreement. Importantly, during this period of time, the underlying grievance regarding the unfairness of the policy remained viable and ready for grievance arbitration. The

appellate court upheld the labor board on the basis that it was owed substantial deference.

There are several lessons that can be learned from the *City of Rockford* decision. First, when parties are negotiating a collective bargaining agreement, great care must be taken to ensure that there is a "meeting of the minds" before a document is to be initialed "TA." Any oversight can result in confusion later or perhaps an unfair labor practice charge. Second, beware attempting to solve a pending grievance over the reasonableness of a policy by incorporating its substance into a new collective bargaining agreement without more clear and explicit reservations of rights. This will preserve flexibility moving forward.

As an epilogue, it is interesting to note that the parties had actually reached a settlement with regard to the grievance over the reasonableness of the policy implementation. It was only after that settlement that issues arose with respect to the unfair labor practice and whether the suggested language regarding the policy should make it into the collective bargaining agreement. The appellate court made its decision a "Rule 23" order which means that it is not to be published and thereby is unlikely to be considered as precedent. In so doing, the court appeared to indicate that it was not necessarily adopting the holding or reasoning of the labor board but following the rule of law that the decision of the administrative body will not be disturbed unless substantial error was committed by that body in the review process. ■

Civil rights claims

Continued from page 2

based on the Village's alleged selective enforcement of its residency ordinance.

Specifically, Cannici argued that several other Melrose Park firefighters had a similar living arrangement but were not charged with violating the ordinance. Cannici did not argue that he was treated differently because of his membership in a protected class, but based on a "class-of-one" theory. Under a "class-of-one" equal protection claim, a plaintiff must show that he or she was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." The court quickly affirmed the district court's dismissal of the equal protection claim by concluding that it was foreclosed by the United States Supreme Court decision in *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008), which decided that "class-of-

one" claims do not apply in the public employment context.

The court further rejected Cannici's argument that equal protection claims should not be precluded in all public employment contexts. Specifically, Cannici argued that since "just cause" was required for termination of an Illinois firefighter, his claim was distinguishable from the "at-will" public employment context in *Engquist*. While the court acknowledged the statutory "just cause" requirement for termination for a firefighter, these statutory protections did not provide "full protection from termination." In fact, the court noted that the Village complied with the statutory "just cause" for termination provisions applicable to firefighters by providing Cannici with "written charges, a hearing, and the opportunity to present evidence."

It is important to note that the court in *Cannici* did not rule on the residency issue as the administrative review court challenging the Board's residency decision had been remanded back to state court for ruling. To date, we are not aware of the final outcome of that state court proceeding.

Setting aside any future decision on residency, the *Cannici* decision supports units of local government seeking to enforce their rules and regulations. A fire district or municipality's termination of a firefighter does not rise to a constitutional violation just because the respective board of fire commissioners or board of fire and police commissioners misapplied or misinterpreted the law or because the firefighter believes he or she was treated unfairly. Judicial review under the Illinois Administrative Review Act is generally the appropriate avenue to seek redress and not a separate federal lawsuit. ■

AED usage

Continued from page 1

2008, the tragic passing of a student who collapsed from sudden cardiac arrest during an Illinois high school's dance practice led to the eventual 2014 signing of House Bill 3724, also known as "Lauren's Law" into law. Lauren's Law required elementary and secondary schools to include proper training on AED use in curricula.

With these recent developments, fire protection districts should remain aware of how the AED Act and related laws, regulations, and federal law work together in having an impact on public health and emergency medical services ("EMS"). The AED Act empowers the Illinois Department of Public Health ("IDPH") to adopt rules on the establishment of programs used to train AED users, identifying accepted courses and requirements for recognition as a trained AED user. In accordance with the AED Act, the IDPH requires data on AED use to be reported to the agency. (410 ILCS 4/25; 77 Ill. Admin. Code 525.500).

The AED Act imposes various duties on anyone obtaining an AED. These duties include taking "reasonable measures" to ensure that the AED is maintained and tested, that anticipated rescuers or users are AED trained, and that the EMS system is activated as soon as possible when "out-of-hospital" AED treatment is given. (410 ILCS 4/20; 77 Ill. Admin. Code 525.600). Beyond the AED Act, other laws outline requirements on AED placement and use by trained staff for physical fitness facilities (210 ILCS 74/15), police departments (65 ILCS 5/3-6040), dental offices (225 ILCS 25/44.5), and other entities. Facilities possessing AEDs are required to notify "an agent of the local emergency communications or vehicle dispatch center of the existence, location, and type of the [AED]." (410 ILCS 4/20(b); 77 Ill. Admin. Code § 527.400).

Alongside these concerns is a recent recall on specific models of AEDs. In late

2017, the U.S. Food and Drug Administration ("FDA") and Phillips Medical Systems, LLC entered a consent decree of permanent injunction against AED producers Philips Medical Systems, Phillips Healthcare, and other parties. The injunction prohibited the manufacturing, processing, packing, holding, or distributing of AEDs from two facilities until Phillips and others comply with federal regulations. *U.S. v. Phillips North America LLC, et al.*, Civil Action No. 17-cv-11955. In the consent decree, two facilities were found to be manufacturing "adulterated" emergency care and resuscitation devices ("ERC") such as HeartStart FRx, HeartStart OnSite, and other AEDs. The Federal Food, Drug, and Cosmetic Act prohibits the production of adulterated medical devices, and a device is considered adulterated if it is prepared, packed, or held in unsanitary conditions, fails to conform with certain performance standards, or violates other portions of the Act. (21 U.S.C. § 351). Consequently, recall notifications for some Phillips' AEDs have been issued, citing problems with the "self-start" mechanism.

As the Illinois General Assembly recognized in its legislative findings under the AED Act, "timely attention in medical emergencies saves lives," and AED use by trained individuals "can increase the number of lives saved." (410 ILCS 4/5). The AED Act and other laws not only assist in services provided by fire protection districts during the minutes between the 911 call and EMS response, but also encourages community involvement in saving lives. Fire districts are in the unique position to promote diligence in checking and servicing AEDs and training users for certification. A district's awareness of a property owner's AED location and maintenance, trained staff, and AED use records further ensures that this goal is obtained. ■

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