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

Volume 25, No. 3 -- Fall 2018

Out with the old, in with the new: The Illinois Service Member Employment and Reemployment Rights Act

by Brian J. O'Connor

"Change is the only constant in life" – Heraclitus of Ephesus, 5th Century BCE

On August 26, 2018, the Governor approved Senate Bill 3547 into law as Public Act 100-1101. The law creates a new act, the Illinois Service Member Employment and Reemployment Rights Act (ISERRA) and becomes effective January 1, 2019. ISERRA clarifies and continues rights and duties of public employees, repealing several laws and amending other laws. ISERRA makes the topics of rights, benefits and obligations more uniform and consistent. Following is a brief synopsis of ISERRA's more salient features.

Applicable Laws

The preeminent federal law on this topic is and remains the Uniformed Services Employment and Reemployment Rights Act ("USERRA", 38 U.S.C. 4301 *et seq.*). ISERRA cites supportively of USERRA's provisions, mirrors some of USERRA's statutory language, and adopts a number of USERRA's employee protections by reference including reemployment; and, continuation of benefits during military service (such as seniority or other entitlements, pension participation, and health insurance participation).

ISERRA consolidates a public employee's protections, rights, benefits and obligations during military service currently addressed in various other State laws. In doing so, on January 1, 2019, ISERRA repeals the following State laws now in effect:

- 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.*), and
- The Municipal Employees Military Active Duty Act (50 ILCS 120/0.01 *et seq.*).

Several other laws are amended; most notably, the Service Member's Employment Tenure Act (330 ILCS 60/1 *et seq.*).

New Definitions

Once vague terms are defined with greater precision in Section 1-10 of ISERRA. Several key and relevant terms include (defined terms in quotes):

- "Active Service" which includes both "Active Duty" and "Inactive Duty,"
- "Benefits" including wages or salary, as well as awards, bonuses, severance pay, and rights and benefits under a pension plan and health plan,
- "Differential Compensation" for most, but not all, periods of military service is the service member's daily rate of pay as an employee less his or her daily military "Basic Pay,"
- "Public Employee" which does not include "Independent Contractors," and
- "Unit of Local Government."

The definitions provide specificity and clarity to better help define and understand employer and employee protections, rights, benefits and obligations.

Continued on page 4

Oak Lawn, residency, and the duty to bargain

by Robert W. Steele, Jr.

The Illinois Appellate Court for the First District of Illinois recently held that, under narrow circumstances, firefighter residency is not a mandatory subject of bargaining. In *Oak Lawn Professional Firefighters Association, Local 3405, v. The Village of Oak Lawn,* 2018 IL App (1st) 172079, during negotiations with the Union, the Village introduced various proposals to include a residency requirement for firefighters. Rejecting these proposals, the Union sought to maintain the "status quo," whereby the labor agreement would continue without such a requirement. Unable to agree on the residency issue and other matters, the parties proceeded to interest arbitration.

From the beginning, the Union maintained that it was under no duty to bargain any residency requirements. The Union argued that the Illinois Municipal Code ("Code") already addressed whether a residency requirement could be imposed on current employees. Under the Code, during a firefighter's period of service, residency requirements cannot be made more restrictive than they were "at the time an individual enters the fire service for a municipality." 65 ILCS 5/10-2.1-6.3(c). To the Union, any residency requirement for current firefighters would qualify as "more restrictive."

In contrast, the Village maintained that the Union had a duty to bargain residency requirements. The Village argued that Section 14(i) of the Illinois Public Labor Relations Act ("Act") controlled the issue. Under the Act, an interest arbitrator's decision is limited to "wages, hours, and conditions

Continued on page 2

Collective bargaining

Continued from page 1

of employment," including residency requirements, but awards that allow out-of-state residency requirements are prohibited. 5 ILCS 315/14(i).

The Union objected to the issue going before the arbitrator, stating that residency was not a mandatory subject of bargaining under these circumstances. As permitted by the administrative regulations of the Illinois Labor Relations Board ("ILRB"), the Village petitioned the general counsel of the ILRB for a declaratory ruling that residency is a required subject of bargaining. The general counsel agreed with the Village, further reasoning that - under the Code - having no residency requirement is not the same as having an affirmative residency requirement already in place. In addition, the general counsel's ruling commented that contractual silence would amount to "no residency restriction at all," meaning an arbitration award granting the Union's status quo proposal would permit out-of-state residency in violation of the Act.

After the general counsel's ruling, the arbitrator issued an interest arbitration award in favor of the Village's residency requirement. While waiting on the award, the Union, on behalf of three out-of-state members filed a declaratory action in circuit court. The Union alleged that the arbitrator exceeded his authority by issuing an award that violated the Code by imposing a residency requirement more restrictive than what was in effect when the members were hired. The circuit court agreed with the Union and issued summary judgment in its favor. The Village subsequently appealed.

On appeal, the First District primarily held that Section 7 of the Act - which outlines the parties' duty to bargain collectively - controls in negotiations over "matters with respect to wages, hours, and other conditions of employment" that are "not specifically provided for in any other law." Siding with the Union, the First District found that Section 10-2.1-6.3(c) of the Code qualified as "a law" applicable to residency requirements specific to firefighters serving municipalities. In turn, the Union had no duty to bargain over residency because the Code provides for the rights of such firefighters on whether residency requirements may be made more restrictive during their period of service.

> ***The Village maintained through nearly all proceedings that a municipality cannot impose a "more restrictive" residency requirement on current firefighters when the requirement did not exist in the first place.***

The First District then proceeded to refute the Village's alternative arguments. The First District held that the Village's home rule authority - the state constitutionally protected broad exercise of power and functions related to government and affairs - was specifically limited by the General Assembly. Section 10-2.1-6.3(a) of the Code contains various provisions on how the Code applies to municipalities in addressing the administration of the firefighter hiring process, regardless of home rule authority. For example, Section 10-2.1-6.3(a) states in pertinent part that a home rule municipality "may not administer its fire department process for original appointments in a manner that is less stringent than this Section. This is a limitation Subsection 6(i) of Article VII of the Illinois Constitution . . . ". According to the First District, the legislature intended to deny home rule authority units from imposing residency requirements on current firefighters that are "more restrictive" than those requirements in place at the time employment began.

The First District also rejected the Village's argument that the absence of a residency requirement is not itself a residency requirement in the meaning of Section 10-2.1-6.3(c). The Village maintained through nearly all proceedings that a municipality cannot impose a "more restrictive" residency requirement on current firefighters when the requirement did not exist in the first place.

In reading Section 10-2.1-6.3 as a whole and construing the "in effect at the time" phrase in context, the First District found that the Code established a default rule of appointment open to all applicants. Under subsection (c), the firefighter appointment process is open to all applicants unless the municipality, by ordinance, limits applicant residency to the "municipality, county or counties in which the municipality is located, State or nation." 65 ILCS 5/10-2.1-6.3(c). The First District reasoned that the legislature's use of residency requirements in effect at the time of entering fire service referred to whether the municipality allowed the default rule of appointment open to all applicants to stand or limited applicants to residents within a geographic area.

The First District ultimately held that Section 7 of the Act controlled in regards to the duty to bargain and that Section 10-2.1-6.3 of the Code applies as a law specifically providing for the residency requirement. In turn, residency was not a mandatory subject of bargaining, should not have been considered by the interest arbitrator under Section 14(i) of the Act, and the arbitrator's decision would not have included "residency requirements . . . that allow residency outside of Illinois" in the first place. (5 ILCS 315/4(i)).

The ruling in this case was nuanced and required heavy statutory analysis. The lesson remains clear – never assume that an issue is a mandatory subject of bargaining. The Illinois Public Labor Relations Act works in conjunction with numerous other laws that can greatly impact the outcome of a dispute over collective bargaining negotiations. Even the absence of statutory language can be construed as an affirmative rule or requirement imposed by and upon a unit of local government. Employers should always proceed with caution during negotiations when approaching potential impasse and interest arbitration. ■

When is your personal text or email subject to FOIA?

by Karl R. Ottosen and Chloe Cummings

In *Ahmad v. City of Chicago*, 16 CH 15152 (2017), the Circuit Court of Cook County re-examined when a public board member's emails and text messages are subject to disclosure under the Freedom of Information Act ("FOIA"). The court followed the holding of *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, that an individual alderman is not a public body because he alone cannot conduct the business of the public body.

Under FOIA, "all records in the custody or possession of a public body are presumed to be open to inspection or copying." (5 ILCS 140/1.2). Further, "each public body shall make available to any person for inspection or copying all public records." (5 ILCS 140/3). Concerns over FOIA disclosure in the electronic age are particularly relevant in society today due to the prevalence of electronic communication in the workplace. Public officials and employees alike must address the issue of whether personal communications on electronic devices are subject to FOIA disclosure.

In *Ahmad v. City of Chicago*, the plaintiff, Ahmad, alleged that an alderman violated FOIA by not producing records responsive to a request for non-city emails discussing Ahmad or his property located in the alderman's ward. The defendant, City of Chicago, moved for summary judgment on the grounds that: (1) the alderman is not a public body under FOIA, and (2) messages on personal devices are not public records subject to FOIA disclosure.

In its decision, the court held that the alderman was not automatically subject to FOIA's disclosure requirements because the definition of "public body" refers to the board or council as a whole, not to an individual board member. The court reasoned the legislature intended the term "public body" to encompass the entire group rather than one individual because the legislature used the plural form "bodies" in the FOIA definition. The term "public body" conspicuously avoids naming an individual member except for 'the head of a public body," such as a board president. (5 ILCS 140/2(e)). Although the General Assembly has amended FOIA on several occasions, it has never expanded the definition of public body. Since the alderman is not a public body because he alone cannot conduct the business of the public body, an email or text message sent to the personal device of a single alderman does not on its own constitute a public record.

The *Ahmad* court reaffirmed that a message contained on a publicly issued device is subject to FOIA. Whether an email or text message on an individual board member's personal device is subject to FOIA depends on the context surrounding the message. Citing the *City of Champaign* case, the *Ahmad* court further recognized that the personal email or text message would constitute a public record if it were used, sent, or received during a city council meeting. Similarly, the email or text message would constitute a public record if it were used, sent, or received by a quorum of the city council. Thus, if the alderman forwarded the message received on his personal device to enough other alderman to constitute a quorum, the message would become a public record. Such messages would be subject to disclosure under FOIA because the alderman would be acting as part of public body while at a public meeting and/or while conducting public business through a quorum.

FOIA disclosure issues also affect a variety of public workers, including the employees of school districts. For example, in *Schill v. Wisconsin Rapids Sch. Dist.,* 786 N.W.2d 177 (Wis. 2010), the Wisconsin Supreme Court held that a teacher's personal e-mails sent on a school computer were not public records because the communications did not pertain to work-related functions. Yet, if the teachers' personal e-mails did pertain to public business, they would constitute public records subject to possible disclosure pursuant to a FOIA request. Although *Schill* dealt with Wisconsin's version of FOIA, the same principle applies in Illinois.

With respect to employees, any emails or texts that pertain to public business are subject to FOIA, regardless of whether they are on a personal or district-issued device. Public bodies act through their employees. Accordingly, communications pertaining to the transaction of public business that are sent or received on an employee's personal e- mail account are "public records" under the definition of that term in section 2(c) of FOIA. The Illinois Public Access Counselor for the Office of the Attorney General ("PAC") reached this conclusion in Opinion 16-006. In that matter, CNN filed a complaint against the Chicago Police Department ("CPD") for failing to turn over emails pertaining to the Laquan McDonald shooting from the personal accounts of 12 named police officers. CPD did a search of its own email accounts and devices and found no records responsive to the request. CPD argued that it had no duty to search individual employees' personal email accounts or disclose any pertinent emails discovered on those accounts. The PAC disagreed, noting that any e-mails exchanged by CPD employees concerning the shooting death of Mr. McDonald presumably pertain to those employees' public duties. While the CPD would not have to disclose

Continued on page 4

ISERRA

Continued from page 1

Military Leave

Time off from work for military service is termed "military leave" in ISERRA. Military leave is addressed in Section 5-5. The service member is only required to give the employer notice of pending military service: the employer's permission is not required, nor may the employer impose conditions for an employee's military leave. Advance notice of pending military service to the employer entitles the employee to military leave.

Employee Service Member Pay

Employee pay during military service is addressed in State law and not in USERRA. Pay remains similar to current law best summarized in the Military Leave of Absence Act, but with notable changes in the method of calculation and imposition of calendar year benefit limits.

Differential compensation is addressed in ISERRA's [Sections 5-10(b) and 1-15], including an expanded explanation and direction on how differential compensation is calculated. CAUTION: This method is more precise and possibly different than prior possible methods of calculation. Also, differential compensation is not paid for certain categories of military service.

"Differential Compensation" of Section 5-10(b) is distinguished from "Concurrent Compensation," which is addressed in Section 5-10(a). Under concurrent compensation, the service member continues to receive his or her full employee pay in addition to any military pay for periods of military service classified as being "Annual Training." Annual training may be performed in a single time period or may be in a series of non-consecutive shorter time periods.

There is a calendar year limit to an employee's pay during military service. For "Concurrent Pay", the limit is 30 days, while for "Differential Pay", it is 60 days. An employee eligible for concurrent pay but having exceeded the 30 day limit may receive differential pay for the excess time up to the 60 day calendar limit.

Other Provisions

Nondiscrimination. ISERRA's Section 5-15 expressly prohibits discrimination by an employer incorporating by reference USERRA's Section 4311.

Employer Notice. ISERRA's Section 5-20 provides that employers must provide employees notice of rights, benefits and obligations under ISERRA.

Compliance. Compliance may be maintained by private action for enforcement [Section 15-5] or action by the Attorney General [Section 15-10]. There is no statute of limitations on compliance efforts [Section 25-5]. Remedies [Section 15-20(a)] available to a court include actual damages, punitive damages for actions brought by the Attorney General, and possible attorney's fees.

ISERRA Advocate. The Attorney General shall appoint an Advocate with staff [Section 30-5] to facilitate implementation and investigation of reports of noncompliance. ■

FOIA and phones

Continued from page 3

communications concerning personal matters unrelated to the transaction of public business, the PAC ordered CPD to search the personal email accounts of the 12 police officers.

Similar "public body" FOIA issues will also impact public employees in their performance of public business. Fire protection districts should take note of the court's increasing trend to balance individual privacy rights and public policy concerns. If board members or employees use personal electronic devices to conduct public business of the district, the communications may be found to be public records subject to disclosure. For this reason, it is recommended that all district-related electronic communications be conducted using district email servers and accounts. Such a practice provides the fire protection district the best opportunity to thoroughly search for responsive records when a FOIA request is made. Fire protection districts can further try to avoid FOIA disclosure issues by instituting clear policies for their elected officers and employees regarding use of personal electronic devices for district-related communications.

If you have any questions regarding the applicability of FOIA to your officials' emails and texts, please contact an Ottosen Britz attorney for assistance. ■

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