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Appellate court provides guidance on interpreting the occupational disease statute

by Donald R. Tyer

After a recent Second District Appellate Court decision, firefighters seeking occupational disability pensions must now establish a causal link between the conditions they were subjected to while on the job and their alleged disability under Section 4-110.1 of the Illinois Pension Code (“Code”).

In *Lindemulder v. Board of Trustees of the Naperville Firefighters’ Pension Fund and the City of Naperville*, ___ Ill.App.3d ___, 2011 WL 824598 (2nd Dist. March 8, 2011), the court ruled that firefighters seeking occupational disability pensions must prove their disability was caused by or resulted from the conditions they were exposed to in their service as a firefighter. The court rejected the plaintiff’s argument that on-the-job conditions that firefighters are exposed to everyday are presumed to have a negative impact on their health and thus could be the basis for the award of an occupational disability pension without evidence that those conditions caused – or were a contributing cause of – their disability.

Naperville Firefighter / Paramedic Edward Lindemulder developed chronic obstructive pulmonary disorder (“COPD”) and was placed on leave on December 15, 2006. COPD, an irreversible and debilitating condition caused by the buildup of scar tissue in the lungs, makes it progressively more difficult to breathe and keep normal levels of oxygen in the bloodstream. In

January 2007, Lindemulder applied for a line-of-duty pension under Section 4-110 of the Code or, in the alternative, occupational disability benefits under Section 4-110.1. The Naperville Firefighters’ Pension Fund Board of Trustees (the “Board”) took testimony regarding Lindemulder’s application over the course of a five-day hearing.

Lindemulder testified that he began smoking at age 16 or 17 and gradually became a pack and a half a day smoker while he was working for the Naperville Fire Department. He also testified that he was exposed to diesel fumes and fire smoke on the job. Other Naperville firefighters working at the same station testified to developing various upper respiratory irritations.

Lindemulder underwent independent medical examinations from three pulmonary disease experts appointed by the Board. Each physician provided a written opinion and testified at hearing. Each of the physicians concluded that Lindemulder was disabled by COPD and that it was caused by his extensive history of cigarette smoking. All of the physicians agreed that Lindemulder would have developed COPD due to his cigarette habit even if he was not a firefighter. Finally, each physician concluded that Lindemulder’s COPD was not caused or permanently aggravated by his exposure to fire smoke

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What is “salary” for the purpose of determining pensions?

by John H. Kelly

A pension board’s determination of the applicable salary on which to base a pension must be the salary set by the municipality’s appropriations ordinance, according to the First District Appellate Court in *Smith v. Board of Trustees of the Westchester Police Pension Fund*, 405 Ill.App.3d 626 (1st Dist. 2010).

On July of 2007, Chief Robert J. Smith of the Westchester Police Department decided to retire. At that time, he was fifty-nine years old and had more than thirty-two years of creditable service. There was no question that he was eligible for the maximum statutory retirement pension of “75% of the salary attached to the rank held on his last day of service for one year prior to the last day, whichever is greater.” (40 ILCS 5/3-111) Prior to his retirement, Chief Smith requested the Village increase his salary in the same manner it had increased the fire chief’s pre-retirement salary. In March of 2007, he requested the new salary be effective May 1, 2007, two months prior to his intended retirement date. The Village Board ultimately approved the change, and Chief Smith’s new salary became effective May 1, 2007. The 2006 Village appropriation ordinance set the police chief’s salary at \$94,742. The 2007 appropriation ordinance increased this amount by 3%. The new salary, equivalent to the salary

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at which the fire chief retired, was \$102,966. Chief Smith also requested that a 1% merit increase and his 2007 holiday pay be included in his final salary for pension calculation purposes.

Prior to the hearing on Chief Smith's retirement salary, the Board sought an advisory opinion from the Illinois Department of Insurance, as provided by Section 1A-106 of the Illinois Pension Code (40 ILCS 5/1A-106). The Department of Insurance determined that the salary increase granted Chief Smith in May of 2007 was a "retirement incentive" and not salary for pension purposes. At the hearing, the

Board of Trustees of the Westchester Police Pension Board specifically considered the question of the police chief's salary for pension calculation purposes.

In October of 2008, the Board issued a written order, finding that the proper amount of Chief Smith's salary for pension purposes was \$103,324. This salary amount included the 2006 salary as set by the appropriation ordinance, 2006 holiday pay, and a 3% cost of living adjustment for 2007. The Board excluded the salary increase and the merit pay. Chief Smith appealed the Board's decision to the Cook County Circuit Court which affirmed the

Board's decision. The circuit court found that the appropriations ordinance which contained the salary level requested by Chief Smith in March of 2007 was enacted by the Village Board eleven days after Chief Smith's retirement date. Smith then appealed to the First District Appellate Court.

In its opinion the appellate court affirmed the order of the circuit court and the Westchester Police Pension Board. The appellate court focused its decision on the definition of the term "salary." The court found two sources for the definition of salary: the Illinois Administrative Code

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and diesel fumes while on the job. Ultimately, all of the physicians believed that Lindemulder was not disabled due to occupational factors or injuries suffered while on duty.

The Board denied Lindemulder's request for line-of-duty disability or occupational disease benefits, and awarded him a non-duty disability pension under Section 4-111 of the Code. The Board found that Lindemulder's failure to make a reasonable effort to stop smoking after being advised to do so was the cause of his disability. The circuit court upheld the Board's decision, and Lindemulder appealed.

Lindemulder argued on appeal that the testimony of the physicians proved that the smoke and toxins he was exposed to as a firefighter exacerbated his COPD, thus entitling him to a line-of-duty pension. But the appellate court disagreed, declaring his arguments were predicated on testimony taken out of context and conclusions not supported by the record. The court held that Lin-

demulder's argument was legally correct, but that he had not proven the connection between his exposure on the job and his COPD. Rather, the court noted the physicians were unanimous in their conclusion that Lindemulder would have developed COPD due to his cigarette smoking, even absent his exposure to fire smoke and toxins. Moreover, the court pointed out that two of the physicians testified that the kind of exposure Lindemulder complained of would more likely have caused him to develop asthma. Lindemulder was never diagnosed with asthma, supporting the finding that any development or aggravation of COPD was caused by smoking cigarettes.

Lindemulder further argued that the legislative findings in Section 4-110.1, when coupled with the testimony, provided a basis for awarding him an occupational disease disability pension. During the enactment of Section 4-110.1, legislators declared that firefighters' duties exposed them to heavy smoke fumes, and carcinogenic, poisonous, toxic or

chemical gases from fires. Lindemulder argued that the legislature's declaration supported his claim that the duties of firefighters have a deleterious impact on their health and thus entitle them to occupational disability pensions. The court again disagreed, holding that the legislature intended that firefighters be able to show that their disability was a result of the conditions they were exposed to in order to qualify for an occupational disability pension. The court held that Lindemulder's missing element was causation - that is, proof that what he experienced on the job actually caused his disabling COPD.

This was a matter of first impression with the appellate court, and as such, has some significance for pension boards considering future applications for occupational disability benefits. In the past, some pension boards may have assumed an applicant's lung disease was a natural by-product of his or her service as a firefighter; now, pension boards must consider whether conditions on the job were the cause or a contributing cause of the lung disease. ■

Court applies the “thirty-five day” time limit to prevent reconsideration of retirement pension benefit amount

by David T. Zafiratos

Final decisions of fire and police pension boards are reviewable under the Illinois Administrative Review Law. (735 ILCS 5/3-101 *et seq.*) This means that a party to a pension board’s final decision can bring a lawsuit in the circuit court of the county where the pension fund is located. A lawsuit brought under the Administrative Review Law allows a court to review “all questions of law and fact presented by the entire record before the court.” (735 ILCS 5/3-110) Importantly, however, “[n]o new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court.” (735 ILCS 5/3-110)

Two issues that frequently arise in administrative review cases are (1) whether the court has been asked to review a “final order;” and (2) whether the plaintiff has complied with the thirty-five day time limitation for filing the lawsuit.

The recent case of *Rutka v. Board of Trustees of the Cicero Police Pension Fund*, 405 Ill.App.3d 563 (1st Dist. 2010), is an example of a case involving these issues.

In *Rutka*, the First District Appellate Court held that the Board of Trustees of the Cicero Police Pension Fund’s initial decision to grant a retirement pension was a “final administrative decision” under the Illinois Administrative Review Law. The court further held that Rutka’s lawsuit was correctly dismissed by the circuit court because it had been filed more than thirty-five days after the Board issued its final administrative decision.

Leonard Rutka, a retired Cicero police officer, initially began receiving a retirement pension after his February 9, 1999, retirement. Rutka retired pursuant to a settlement agreement with his employer, whereby Rutka agreed to retire from his position as a lieutenant with the

police department. Shortly thereafter, on February 18, 1999, the Board calculated Rutka’s pension benefits at \$65,759.38 based on the rank of lieutenant. That same day, the Board recalculated Rutka’s pension to be \$68,759.38, based on the combined rank of deputy superintendent and lieutenant.

Six years later, on January 10, 2005, Rutka asked the Board to recalculate his pension based entirely on the deputy superintendent salary, instead of the combined rank of deputy superintendent and lieutenant. This recalculation would have increased Rutka’s pension benefits. The Board voted to grant Rutka’s request; however, the increased benefits were never paid to Rutka.

Two years later, on July 6, 2007, Rutka requested a hearing before the Board, again asking the Board to recalculate his pension based entirely on the rank of deputy

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and the Illinois Pension Code. The Illinois Administrative Code is a set of rules established by various state agencies to assist in the interpretation and application of state laws. 50 Ill. Adm. Code §4402.30 defines “salary” for pension purposes to be “any fixed compensation” that is approved “through an appropriation ordinance of the municipality.”

Next, the court focused on Section 3-125.1 of the Illinois Pension Code (40 ILCS 5/3-125.1), which defines “salary” as “the annual salary, including longevity, attached to the police officer’s rank, as established by municipality’s appropriation ordinance...” (note that Section 4-118.1 of the Code, applicable to firefighters, contains the exact same definition of

salary). The appellate court pointed to the plain language of both the Illinois Administrative Code and the Illinois Pension Code in holding that the term “salary” must be defined as the compensation attached to a position in the police or fire department based on the municipality’s appropriation ordinance. The court found that even though the increase in Chief Smith’s salary had been approved by the trustees and the Village President, it could not serve to increase his salary for pension purposes, absent an appropriations ordinance showing the same change. The court also held that other forms of pay, i.e. merit pay and holiday pay, should have been included in the appropriations ordinance if they were to be considered salary for

pension purposes. The *Smith* case presents a number of important lessons for pension boards:

1. Establish a record relative to the determination of “salary” when awarding pensions.
2. Include salary and all other forms of pay in the municipality’s appropriations ordinance, if they are to be considered salary for pension calculation purposes.
3. Seek an advisory opinion from the Illinois Department of Insurance prior to making determinations on a final salary for pension calculation purposes, particularly where it is unclear what specific components of salary should be considered. ■

Thirty-five day time limit

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ty superintendent. The Board held a hearing and denied Rutka's request in a decision dated January 27, 2009. The Board based its decision on the fact that more than thirty-five days had passed since its February 18, 1999, decision to base the pension on the combined rank. After the Board denied his request for an increased pension, Rutka filed a complaint for administrative review.

Rutka's complaint for administrative review asked the circuit court to rule that the Board incorrectly refused to modify his pension benefits through its January 27, 2009, order. The circuit court ruled in favor of the Board, and Rutka appealed.

The appellate court held that more than thirty-five days had passed since the final administrative decision of the Board regarding Rutka's pension benefits. However, it was not the January 27, 2009, decision - or even the January 10, 2005, decision - that the court considered as the "final administrative decision." Instead, the court held that the Board's initial determination of Rutka's pension, from February 18, 1999, constituted a final administrative decision that could only be challenged under the

Administrative Review Law within thirty-five days.

The Board's action on January 10, 2005, granting Rutka's request for an increased pension amount based entirely on the rank of deputy superintendent, was itself invalid because it occurred greater than thirty-five days after February 18, 1999. In so holding, the court addressed two common issues involved in pension board administrative review

Under the Administrative Review Law, the Board's decision must be challenged within the thirty-five day time limitation.

cases. It identified the February 18, 1999, Board action as a final administrative decision, and it applied the thirty-five day time limitation for filing a lawsuit under the Administrative Review Law.

On a side note, the court also addressed an argument put forth by Rutka that the calculation of his pension benefits should have been considered an "error" under Section 3-144.2 of the Illinois Pension Code. (40 ILCS 5/3-144.2)

Section 3-144.2 allows a police pension board to modify pension benefits if an "overpayment, due to fraud, misrepresentation or error" has occurred. (40 ILCS 5/3-144.2) Quite simply, the court held, Rutka's claim was that his pension benefits had been underpaid, not overpaid. Section 3-144.2 only applies to overpayments.

The *Rutka* case highlights the importance of careful and deliberate consideration prior to a pension board issuing a final administrative decision, as well as the diligence required of an applicant to seek a review of a decision which he or she believes is in error. Because of the brief time frame in which a final administrative decision can be modified, pension boards should always be thorough and conduct all necessary inquiries prior to making a final administrative decision. ■

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