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Nov. 2022 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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8 RECENT CASES

- **ONLINE LIBRARY OF CASE SUMMARIES:** **Fire & EMS Law Summary at Scholar@UC**
- **NEWSLETTERS:** If you would like to be added to UC Fire Science listserv, just send him an e-mail. Check out the current and past newsletters on the UC Fire Science webpage
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017

File: Chap. 1, American Legal System

MA: FIRE CHIEF SELECTION PROCESS CHANGED TO ASSESSMENT CENTER – NO NEED BARGAIN WITH UNION

On Oct. 27, 2022 in City of Everett v. Commonwealth Employment Relations Board, the Appeals Court of Massachusetts held (3 to 0), unpublished opinion, that the State Board incorrectly ordered the city to collectively bargain the changes in hiring Fire Chief. In Jan. 2019, after one year of informal dialog with the union, the City proceeded with Assessment Center process; only the seven Deputy Fire Chiefs were eligible to apply.

> "Under those circumstances, it is incorrect to say that the processes for selecting the fire chief impact the 'terms and conditions of employment' of the deputy fire chiefs. The selection processes for chief do not change, alter, or impose upon the current jobs of the deputy chiefs or other bargaining unit employees. Rather, the selection process has to do with the deputies' efforts to *leave* the bargaining unit and to become part of management, where they would occupy a supervisory and, in some ways, adverse position to the bargaining unit. As the chief officer, the city's fire chief, among his or her other duties, leads the department, acts under the direction of the mayor, works with employee organizations, responds to employee grievances, assists city officials in the collective bargaining process, and is a member of the city's management team. Cf. *Harrison v. Labor Relations Comm'n*, 363 Mass. 548, 553 (1973) (fire chiefs participate in development of department policy and implement it on behalf of management). The board's suggestion that bargaining is required because the fire chief position is part of the 'promotional ladder' for deputy chiefs is accordingly inapt. The promotion the deputies seek here would have them cross over to a fundamentally different job."

FACTS:

> "Over a one-year period that began before that exchange, the city entered into a series of delegation agreements with HRD, culminating in a January 2019 final agreement that authorized the city to use an assessment center as the sole basis (excepting statutory preferences and in-title credit) for scoring and ranking candidates for the chief position eligibility list. No further communications between the city and the union about the assessment center occurred.
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> No one disputes that the city's decision to use the assessment center fell within the sphere of its core managerial prerogative. The question presented is whether the board erred by ruling that the city nevertheless had a duty to bargain over other 'aspects of the promotional process' for fire chief that supposedly would not impinge on the city's core managerial prerogatives. We conclude that the board erred as a matter of law and misapplied established precedent, as the processes for selecting the managerial position of fire chief are not subject to the collective bargaining process. Therefore, notwithstanding the deferential standard of review, the board's decision cannot stand."

Legal Lesson Learned: A change in the hiring process for Fire Chief did not impact terms and conditions of employment of union members.

File: Chap. 2, Safety

LA: RAILROAD BLOCKED ROAD – CARDIAC PATIENT – NEW HELICOPTER PICKUP, 8 MINUTES – DIED – NO LIAB. FOR RR

On Oct. 20, 2022, in Brenda R. Blalock v. Union Pacific Railroad Company, U.S. Court of Appeals for Fifth Circuit (New Orleans), the Court held (3 to 0) that trial court properly granted summary judgment to the railroad, since they were not aware of emergency transport until after the ambulance driver decided to take another route.

> "[T]here is insufficient evidence to support Brenda's claims that Union Pacific caused a delay in Leo receiving medical care. The timespan from the Blalocks' home to the new rerouted landing zone was approximately eight minutes. Evidence shows that when the ambulance approached the railroad crossing and noticed it was blocked, paramedics immediately rerouted to Alexandria where the new landing zone and destination hospital were located. The paramedic testified that she did not 'even waste like 30 seconds' and when asked did they wait at the track, she responded '[w]e didn't.' The evidence also shows that Union Pacific was not notified about the emergency vehicle until *after* the ambulance had already rerouted. Therefore, at the time the ambulance needed to cross the railroad tracks, Union Pacific was not aware of Leo's emergency. And even if it were, it 'would have been impossible' for the train to break within the 'seconds' the paramedics were at the crossing. In the absence of sufficient evidence to the contrary, we conclude that Brenda has failed to show a genuine issue of material fact as to causation."

FACTS:

> "Around 1:00 p.m. on June 27, 2019, Brenda was at her home in Bunkie, Louisiana when she noticed that her husband Leo was 'white as a sheet' and unresponsive. She called 911 and minutes later the Bunkie Fire Department arrived. The Acadian Ambulance followed shortly thereafter. The paramedics placed Leo in the ambulance, but he initially refused to go to the hospital. After some discussion, he eventually complied. Although Bunkie General Hospital ('Bunkie General') was closest-just under three minutes from the Blalocks' home-the paramedics determined Bunkie General could not provide the type of care Leo required, and instead, he needed to go to Rapides Regional Medical Center ('Rapides Regional'), in the city of Alexandria. The ambulance left the home at about 1:58 p.m. The plan was to drive Leo to a helipad that was located outside of Bunkie General where he would be transported by helicopter to Rapides Regional, but that plan quickly changed.
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> Union Pacific operates a railroad train that was stopped on a side track in Bunkie. En route to the helipad, paramedics noticed the railroad crossings were blocked. The paramedics did not wait and rerouted towards Alexandria. Thereafter, the fire department arranged for the new helicopter pick-up location to be at a landing zone intercept in Alexandria. Approximately eight minutes after the ambulance departed from the Blalocks' home, the ambulance and the helicopter met at the new landing zone intercept, and Leo was flown to Rapides Regional.
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> Meanwhile, minutes after the ambulance rerouted, a firefighter contacted Union Pacific and reported that an ambulance was unable to cross the tracks. Union Pacific points to evidence that a train dispatcher arranged to break the train. Brenda, on the other hand,

alleges she was told that Union Pacific advised the fire chief or the police that they were 'resting' and would not break the train. Nevertheless, the train was broken at 2:23 p.m., but by that time Leo was already with the helicopter. Leo later died at Rapides Regional."

Legal Lesson Learned: Establish protocol for EMS transports when railroad blocking route.

Note: See this article (Fall 2021):

Don't Let Railroads Become Roadblocks

Take advantage of resources available to help EMS and other first responders avoid delays caused by railroads and respond safely to incidents on or near railroad crossings.

"Fortunately, resources exist to help first responders facing these circumstances. According to Michail Grizkewitsch with the Federal Railroad Administration's Office of Railroad Safety, one of the first things responders can do is look for a blue Emergency Notification System sign with two sets of numbers on it. One is the phone number that will connect them directly to the railroad dispatcher overseeing that specific track. The other number is a unique Department of Transportation identifier for that crossing, so you can quickly let the dispatcher know where you are."

Chap. 3 – Homeland Security, incl. Active Shooter, Cybersecurity, Immigration

Chap. 4 – Incident Command, incl. Training, Drones, Communications

Chap. 5 – Emergency Vehicle Operations

File: Chap. 6, Employment Litigation

NY: FF ON DUTY INJURED RIGHT HIP – MRI SHOWED HISTORY JOINT DISEASE – NO ACCIDENTAL DISAB.

On Oct. 26, 2022, In the Matter of Joseph M. Kearney v. Daniel A. Nigro, et al., the Supreme Court of New York held (4 to 0), 2022 NY Slip Op 06007, that the Pension Fund properly denied the firefighter's application for accidental disability retirement benefits and retired him on ordinary disability retirement benefits. Although the firefighter was disabled due to his right hip injury, this disabling condition was causally related to chronic degenerative joint disease, not a work-related injury.

Here, the Medical Board's initial determination that the petitioner's 'right hip disability is causally related to Chronic Degenerative Joint Disease,' which remained unchanged upon further consideration, was supported by credible evidence, consisting of the results of the MRI performed on August 14, 2015…. Accordingly, it cannot be determined as a matter of law that the petitioner's disability was caused by his May 2015 accident. Moreover, contrary to the petitioner's contention, the record does not support a determination, as a matter of law, that his pre-existing degenerative condition was exacerbated by the accident…."

FACTS:

> "On May 18, 2015, the petitioner allegedly sustained an injury to his right hip when he tripped and fell while working as a firefighter with the New York City Fire Department. An MRI taken on August 14, 2015, revealed '[s]evere degenerative arthrosis of the right hip joint with significant reactive marrow edema within the proximal femur and supra-acetabular region.' On January 5, 2016, the petitioner underwent right total hip arthroplasty."

Legal Lesson Learned: Hip replacement was not due to a work-related injury; ordinary retirement.

Chap. 7 – Sexual Harassment, incl. Hostile Work Atmosphere, Pregnancy Discrimination, Gay Rights

Chap. 8 – Race / National Origin Discrimination

File: Chap. 9, ADA

NY: DISABLED FF - CAN TERMINATE AFTER 1-YR ON MEDICAL LEAVE – MUST NEGOTIATE UNION REVISED CBA

On Oct. 25, 2022, In the Matter of City of Long Beach v. New York State Public Relations Board; Long Beach Firefighters Association, IAFF, Local 287, 2022 NY Slip Op 0593, the New York Court of Appeals held (6 to 0) that the City must collectively bargain the procedures for terminating disabled firefighters who have been on leave for one year. Firefighters may be terminated after one year under the "Taylor Law" [enacted in 1967 following costly transit strikes in 1966], but the termination procedures and rights to reinstatement if no longer disabled must be collectively bargained in the Collective Bargaining Agreement.

> "We disagree with the City that requiring municipalities to negotiate those pretermination procedures frustrates the legislative intent of allowing employers to maintain efficiency by quickly filling vacancies on a permanent basis after a year. In the future, the City and the Union will only need to negotiate pretermination procedures as part of any new collective bargaining agreement, not every time the City seeks to terminate an employee."

FACTS:

> "Nonparty Jay Gusler is a professional firefighter for the City of Long Beach (City) and a member of the Long Beach Professional Firefighters Association (Union). He sustained injuries in the line of duty in November 2014, which were later determined to be compensable under the Workers' Compensation Law.
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> "Section 71 [of Taylor Act] does not, for example, specify the amount of advance notice that the employee must receive, the content of such notice, or the requirement that the employee have an opportunity to be heard prior to termination. Indeed, inasmuch as section 71 does not reference pretermination procedures at all, the statute plainly leaves room for the City and the Union to negotiate those procedures."

Legal Lesson Learned: The City and the IAFF Local must now collectively bargain the procedures for termination and also possible reinstatement of disabled firefighters.

Chap. 10 – Family Medical Leave Act, incl. Military Leave

Chap. 11 – Fair Labor Standards Act

Chap. 12 – Drug-Free Workplace, inc. Recovery

File: Chap. 13, EMS

OK: SEIZURE PATIENT RESTRAINED – ASKED PD TO HANDCUFF – DIED AT SCENE – NO 4th AMEND VIOL.

On Oct. 28, 2022, in Charles Kaleb Vanlandingham, Administrator for the Estate of Charles Lamar Vanlandingham v, City of Oklahoma City, U.S. District Court Chief Judge Timothy D. Degiusti, Western District of Oklahoma, granted the EMS and firefighters motion to dismiss; they enjoy qualified immunity.

> "Accepting the factual allegations of the Second Amended Complaint and viewing them in the light most favorable to Plaintiff, the Court finds that Plaintiff has failed to allege sufficient facts to show a Fourth Amendment violation by Firefighters. Therefore, the Court finds that the Second Amended Complaint fails to state a plausible § 1983 claim of unlawful seizure or excessive force against Firefighters."

FACTS:

> "According to Plaintiff's allegations, the paramedics and Firefighters both arrived at the scene in response to an emergency call for medical assistance, and the paramedics took charge of the situation as a medical matter when they found Mr. Vanlandingham in a postictal seizure state, unaware of his surroundings. Although Plaintiff alleges the medical responders acted incompetently or negligently in restraining Mr. Vanlandingham, Plaintiff provides no facts from which to conclude they assumed a law enforcement role. *See Peete*, 486 F.3d at 222 (paramedics did not violate Fourth Amendment by restraining person when responding to medical emergency call regarding epileptic seizure; '[t]hey were not acting to enforce the law, deter or incarcerate'); *see also McKenna*, 617 F.3d at 439-40 (Fourth Amendment claim turned on whether police officers 'acted in a law-enforcement (e.g., investigative or prosecutorial) capacity" or emergency-medical-response capacity)."

Legal Lesson Learned: EMS patient restraint protocols may include requesting law enforcement assistance.

File: Chap. 13, EMS

MI: CPD PATIENT REFUSED TRANSPORT - NO REFUSAL FORM SIGNED – 2nd CALL, DIED CARDIAC - EMS IMMUNITY

On Oct. 27, 2022, in Myra Buffington, Personal Representative of the Estate of Maurice Freeman v, Alic Layne, Ryan Cook and City of Detroit, the Court of Appeals of Michigan held (3 to 0), unpublished opinion, that trial court properly granted summary judgment to the defendants, since there was no evidence of gross negligence, even if the Medics didn't get a signed refusal form.

> "Bad things happen in the world. In a world of accountability, everybody likes to point fingers and sit in judgment. The real world is a different place than the comfort of an office sitting behind a computer. Fault by which humans can be held legally liable does not always flow from bad things happening in the real world. While Mr. Freeman's death is tragic, an even greater tragedy is pinning blame (gross negligence/willful misconduct) on EMS techs doing a difficult job under trying circumstances. Those of us fortunate to sit in the relative comfort and safety of offices on our computers using big fancy words like gross negligence, should keep in mind, as we are tasked with determining legal liability for folks in the real world, that tragic results are not always avoidable and don't always equate with the high bar of gross negligence."

FACTS:

> "This case arises from two emergency medical services (EMS) runs to Freeman's home in Detroit in April 2018. Freeman was 67 years old at the time, had chronic obstructive lung disease, and was diagnosed with chronic lymphocytic leukemia in February 2018. His medical records indicated that he never sought treatment for the leukemia.
> Freeman's roommate, Steve Colvin, first called 911 at 9:18 p.m. on April 15, 2018, because Freeman had an at-home oxygen supply but could not breathe, the power was out, and Colvin had no car. Layne and Cook, employees of Detroit's fire and emergency services department, were dispatched to Freeman's house both times. Cook and Layne testified that during the first run, Freeman refused treatment or transport to the hospital, but did request that defendants show Freeman how to use his auxiliary oxygen tank, which they did. Defendants did not have Freeman sign a refusal of care form. Cook stated that Colvin was intoxicated at the time. Defendants left, and Freeman was breathing normal. The EMS reports later compiled indicated a 'code 3,' meaning Freeman refused treatment.
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> Colvin again called 911 at 1:48 a.m. on April 16, 2018, and Cook and Layne responded. Colvin said that Freeman said he could not breathe, and assumed the tank was empty, but was not sure. Cook told Layne to prepare the stretcher, and tried to evaluate Freeman, but Colvin was interfering by being physically and verbally aggressive. Cook then transferred Freeman to a gurney and with Layne, into the ambulance. Freeman was taken to the

hospital, and determined to have suffered from cardiac arrest. Freeman was put on life support at the hospital until his family decided to take him off, and he died on May 5, 2018."

Legal Lesson Learned: Use the Refusal Form or document why patient would not sign; reduce risk of litigation.

Chap. 14 – Physical Fitness, incl. Heart Health

Chap. 15 – CISM, incl. Peer Support, Employee Assistance

Chap. 16 – Discipline, incl. Code of Ethics, Social Media, Hazing]

File: Chap. 17, Arbitration, Labor Relations

OH: MINIMUM MANNING 10 FF – CITY IN 2016 BELOW FOR THREE YEARS – OWES BACKPAY / INTEREST $1,188.219

On Oct. 13, 2022, in East Cleveland IAFF 500, et al. v. City of East Cleveland, et al., the Court of appeals of Ohio, Eight District (Cuyahoga County) held (3 to 0) that the March 2017 arbitration award for the union is enforceable. The arbitrator found that the City breached the CBA starting April 12, 2016 and required the City to immediately restoring staffing to ten (10) firefighters per shift and restore back pay to all affected firefighters who would have been entitled to overtime on the call-out list after April 12, 2016.

> "We find that the trial court's award of damages in the amount of $1,188,219.36 is consistent with the March 12, 2017 Arbitration Award. The trial court heard testimony that through 2018, 2019, and 2020 the City had not restored staffing to ten firefighters per shift for every shift as required by the Arbitration Award and determined, consistent with the evidence presented, that certain affected firefighters were owed a total aggregated amount of $1,188,219.36 in backpay."

FACTS:

> "In early April 2016, the fire chief issued a memorandum that stated, 'there will be layoffs constituting fifteen (15) part time member[s] effective immediately at 0830 hours on April 12, 2016. This will leave the daily staffing level at eight (8).' In response, the Union filed a grievance and submitted the grievance to arbitration pursuant to the CBA, alleging that the City was in violation of Article 9 of the CBA.
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> Following an arbitration hearing, the arbitrator issued a decision on March 12, 2017, finding that the City breached the CBA by reducing staffing levels at the fire department, requiring the City 'to immediately restore staffing at the [fire department] to * * * ten (10) [firefighters]/shift,' and ordering the city 'to make all affected [firefighters] whole in

back pay/lost benefits who would have been entitled to overtime on the call-out list under the terms of the [CBA] at any/all dates post April 12, 2016' ('the Arbitration Award')."

Legal Lesson Learned: The arbitration award has been upheld.

File: Chap. 18, Legislation

FL: OVARIAN CANCER IN 2017 - FIVE YEARS AFTER HER RETIREMENT – NEW CANCER LAW 2019 NOT RETROACTIVE

On Oct. 21, 2022, in Kathleen Weaver v. Volusia County, Florida, the Florida Court of Appeals, Fifth District, held (3 to 0) that the trial court properly held (3 to 0) that the new statute is not retroactive. When she learned of her cancer in 2017 her only remedy was a workers' comp claim, which would have required her to prove the cancer was caused by her job. She didn't file such a claim and cannot now benefit from the new law creating a presumption that it was caused by the job.

> "As a substantive law, section 112.1816 is presumed to apply prospectively unless the text 'provides for retroactive application,' and 'such application is constitutionally permissible.'… For these reasons, we find that section 112.1816 is not retroactive and, thus, affirm the trial court's order granting the County summary judgment."

FACTS:

> "Appellant served as a fulltime firefighter with the County for thirteen years before retiring in 2012. Five years later, in 2017, she was diagnosed with ovarian cancer, which she attributes to her years of service as a firefighter. Despite this diagnosis, Appellant did not file a claim for workers' compensation benefits.
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> In 2019, the Legislature passed section 112.1816, Florida Statutes, which provides previously unavailable benefits to firefighters who meet certain criteria and are diagnosed with certain cancers, including ovarian cancer. These benefits include a one-time payment of $25,000 and full coverage of the firefighter's cancer treatment. § 112.1816, Fla. Stat. (2019). The statute took effect on July 1, 2019. Ch. 2019-21, § 1, Laws of Fla.
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> Specifically, the statute provides that if a firefighter (1) 'has been employed by his or her employer for at least 5 continuous years,' (2) 'has not used tobacco products for at least the preceding 5 years,' and (3) 'has not been employed in any other position in the preceding 5 years which is proven to create a higher risk for any cancer,' then, upon being diagnosed with one of the twenty-one cancers listed in the statute, the firefighter is entitled to a one-time cash payment of $25,000 and full coverage of the firefighter's cancer treatment. § 112.1816(2), Fla. Stat. (2019)."

Legal Lesson Learned: Firefighter cancer law very helpful; but State legislature did not make it retroactive.