

**BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND**

| | | |
|-----------------------------|---|---------------------------|
| IN THE MATTER OF JOHN HASH. |) | 1977 POLICE OFFICERS' AND |
| |) | FIREFIGHTERS' PENSION AND |
| CITY OF FRANKLIN, |) | DISABILITY FUND |
| Petitioner. |) | |

ORDER

This matter was assigned to the undersigned administrative law judge by letter dated July 29, 2009, for adjudication of the City of Franklin's objection to the 1977 Fund's initial determination that Firefighter Hash is entitled to disability benefits. The City's objection is authorized by Ind. Code § 36-8-8-13.1(e). Appeals are adjudicated under the Indiana Administrative Orders and Procedures Act (IAOPA), Ind. Code art. 4-21.5. See Ind. Code § 36-8-8-5(b), -22.

While the Code of Judicial Conduct does not apply to administrative law judges (*see* Code Jud. Cond., Application, Part I.A.), the IAOPA provides in pertinent part:

(c) If the [administrative law] judge believes that the judge's impartiality might reasonably be questioned, or believes that the judge's personal bias, prejudice, or knowledge of a disputed evidentiary fact might influence the decision, an individual assigned to serve alone or with others as an administrative law judge shall:

(1) withdraw as the administrative law judge; or

(2) inform the parties of the potential basis for disqualification, place a brief statement of this basis on the record of the proceeding, and allow the parties an opportunity to petition for disqualification under subsection (d).

(d) Any party to a proceeding may petition for the disqualification of an individual serving alone or with others as an administrative law judge upon discovering facts establishing grounds for disqualification under this chapter. The administrative law judge assigned to the proceeding shall determine whether to grant the petition, stating facts and reasons for the determination. If the administrative law judge ruling on the disqualification issue is not the ultimate authority for the agency, the party petitioning for disqualification may petition the ultimate authority in writing for review of the ruling within ten (10) days after notice of the ruling is served. The ultimate authority shall conduct

proceedings described by section 28 of this chapter to review the petition and affirm, modify, or dissolve the ruling within thirty (30) days after the petition is filed. A determination by the ultimate authority under this subsection is a final order subject to judicial review under IC 4-21.5-5.

Ind. Code § 4-21.5-3-9(c) and (d).

I am an attorney and shareholder in the law firm of Stephenson Morow & Semler, P.C. A large percentage of the firm's practice consist of defending and representing political subdivisions and their officers and employees. Most of these cases are assigned by the governmental entity's insurance carrier.

I am attorney for the City of Franklin in a pending case, *RBD Holdings, LLC v. Franklin Plan Commission and City of Franklin*, No. 41D01-0902-PL-17 (Johnson Sup. 1). Plaintiff claims that the City violated its constitutional rights by the taking of private property for a public purpose without just compensation (unconstitutional city code and inverse condemnation). Plaintiff also pleads a tort claim of misrepresentation based on conduct of an attorney for the Plan Commission. The suit was filed in February 2009 and is in the discovery stage.

I recall four occasions when I represented the City of Franklin in litigation or pre-litigation matters that are now concluded.

In 2008, the plaintiff in the above case filed a similar claim in federal court, *RBD Holdings, LLC v. Franklin Plan Commission and City of Franklin*, No. 1:08-CV-1143-LJM-JMS (U.S. Dist. Ct., S.D. Ind.). The case was dismissed for lack of jurisdiction (leading to plaintiff's decision to pursue the above action in state court).

In 2008, I defended the City against an EEOC charge of employment discrimination filed by a police officer who claimed age and disability discrimination, *Rick Sharp v. Franklin City Police Department*, No. 470-2008-03825 (EEOC). I attended a mediation with the police chief, city attorney and others. I then filed a position statement. The complaining party later withdrew the charge.

In 2003, I was assigned to defend the City in *American Outdoor Advertising Co., LLC v. City of Franklin*, No. 1:03-CV-674-JDT-TAB (S.D. Ind.), in which plaintiff claimed that the City's code restrictions on billboard advertising violated the First Amendment. The case was settled after discovery and the filing of a summary judgment motion. In the course of that case I met at least twice with the City's board of public works and safety to discuss litigation and settlement strategy.

Also in 2003, I was assigned to defend the City against a claim of sexual harassment by an employee of the police department. This claim started as an EEOC charge and later

became a lawsuit, *Linda Saylor v. City of Franklin*, No. 1:04-CV-881-LJM-WTL (S.D. Ind.). The claim was dismissed as part of a settlement.

In addition to the above insurance defense litigation, the City retained me in 2009 to review and render a legal opinion on an employment policy. That matter is concluded.

In the above cases, I met and/or worked with several city officials, including a former mayor and the current mayor, the clerk-treasurer, the current chief of police, and the city attorney. As noted above, I met with the board of public works and safety in 2003 and 2004 regarding the *American Outdoor Advertising* litigation. None of these matters involved the fire department.

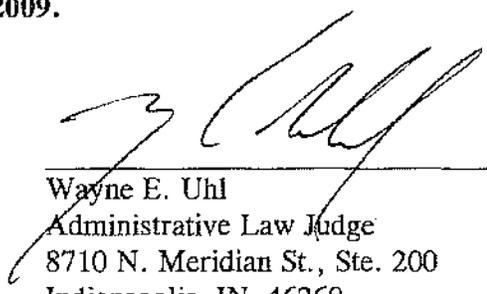
I have not received information about this particular matter, and I do not believe I would have any predisposition in favor of the City. Therefore, I am not required to withdraw due to "personal bias, prejudice, or knowledge of a disputed evidentiary fact."

However, I believe a reasonable person would question my impartiality in adjudicating the City's objection to the initial determination. On this score, "The question is not whether the judge's impartiality is impaired in fact, but whether there exists a reasonable basis for questioning a judge's impartiality." *Tyson v. State*, 622 N.E.2d 457, 459 (Ind. 1993). Guided by Chief Justice Shepard's thoughtful analysis in that case, it seems clear that were I to make findings of fact, a recommended decision or even evidentiary rulings in favor of the City, a reasonable person might question whether I did so to favor my client. By the same token, a ruling against the City might be seen as an effort to avoid an appearance of impropriety.

As the Chief Justice pointed out in *Tyson*, Indiana has leaned toward recusal where reasonable questions about impartiality exist, and as to court judges, omits the option of remittal or waiver of disqualification by the parties. 622 N.E.2d at 460 (Rule 2.11 of the current Code of Judicial Conduct likewise appears to preclude the possibility of waiver by the parties). The IAOPA approach is slightly different, directing that the ALJ either withdraw or present the circumstances to the parties and giving them the option to petition for disqualification, but the statute does not permit the parties to waive where a ground for disqualification exists. In other words, if a ground for disqualification clearly exists, there is no need to present the question to the parties.

For these reasons, pursuant to Ind. Code § 4-21.5-3-9, I hereby withdraw as administrative law judge in this matter. The PERF Board is required to appoint a substitute pursuant to § 4-21.5-3-9(a).

SO ORDERED ON August 5, 2009.



Wayne E. Uhl
Administrative Law Judge
8710 N. Meridian St., Ste. 200
Indianapolis, IN 46260

Copies:

Kathryn Morgan Cimera
General Counsel, PERF
143 W. Market St.
Indianapolis, IN 46204

Michael A. Schoening
NATION SCHOENING MOLL, P.C.
721 E. Broadway
Fortville, IN 46040

Matthew G. Langenbacher
LANGENBACHER KARLSON, LLC
748 Massachusetts Ave.
Indianapolis, IN 46204

BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE PUBLIC EMPLOYEES' RETIREMENT FUND

IN THE MATTER OF JOHN HASH,) 1977 POLICE OFFICERS' AND
) FIREFIGHTERS' PENSION AND
CITY OF FRANKLIN,) DISABILITY FUND
 Petitioner.)

**ORDER ON RESPONDENT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT AND REMAND**

Pursuant to the Pre-Hearing Conference Order herein, and representations of counsel, Respondent, John Hash ("Hash") submitted to your Administrative Law Judge ("ALJ") his Motion for Partial Summary Judgment and Remand ("Motion") on or about October 19, 2009. In addition to said Motion, Hash submitted Exhibits 1-11 for the ALJ's consideration in ruling upon his Motion. In response thereto, 1977 Police Officers and Firefighters' Pension and Disability Fund's ("Pension and Disability Fund") Motion to Join in Argument One of Respondent John Hash's Motion for Summary Judgment was submitted to the ALJ on or about October 19, 2009. A final pleading was filed by the City of Franklin ("City") on October 29, 2009, such being the City's response to Hash's Motion. Pursuant to said Pre-Hearing Conference Order, the ALJ was requested to rule upon Respondent's Motion and Response thereto unless a specific hearing was requested by any counsel or by the ALJ. No counsel has requested a Hearing and the ALJ has now reviewed the Motions before it and the following Findings and Order is now entered, as follows:

1. Hash submitted a "Request for Application of Disability Pension" ("Request") on or about October 23, 2008. On said date, Hash was employed by the City as a firefighter. Said request does state that he is no longer able to perform his duties, asserts multiple health issues, and asserts that such health issues prevent him from continuing with the Franklin Fire

Department ("FD"). Said Request appears to be on a form which provides notice to the City FD which puts the City on notice that a disability pension is being sought.

2. Hash, on November 13, 2008, submitted Notice of Retirement ("Notice") to James Reese, Chief of the Fire Department for the City and therein further informed the City and FD of his alleged disability and sought coverage under the FD long-term disability plan (if available). Said Notice also reports to Chief James Reese and the City that he suffers from various medical and personal issues that prevent him from continuing as an active member of the FD.

3. Hash did appear before the Fire Pension Board of Trustees ("Pension Board") on December 1, 2008, and the Pension Board accepted Hash's request for retirement effective November 16, 2008.

4. Hash continued to secure medical reports concerning his disability and upon securing said additional medical reports formally submitted his Application for Disability Benefits on or about May 6, 2009.

5. Thereafter said Application for Disability Benefits and exhibits submitted in support thereof, was heard by the Local Board and his disability was approved.

6. The statutes of the State of Indiana governing the Application for Disability Benefits by a disabled member of the Pension and Disability Fund do not provide that such proceedings are limited, or otherwise impacted, by other proceedings relating to discipline or other matters, nor is the granting of such benefits precluded by the City providing severance

packages or other benefits which the City itself may choose to provide as a benefit to their disabled or retired employees.

7. On May 6, 2009, the Local Board held a hearing to consider Hash's Application for Pension Disability and approved Respondent's Application and appropriate documentation of such consideration was submitted to the Board of Trustees of the Indiana Employees' Public Retirement Fund thereafter.

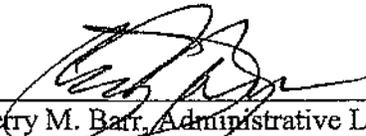
8. On July 2, 2009, the Board of Trustees of the Indiana Employees' Public Retirement Fund made their initial determination that awarded Hash disability benefits under the Pension and Disability Fund.

9. To the extent that the City has objected to the determination by the Board of Trustees of the Public Employees Retirement Fund as "contrary to law", the ALJ now finds that said objection should be overruled as not sustained by factual evidence or legal citations which would cause the ALJ to find a genuine issue of any material fact.

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED THAT there is no genuine issue as to material fact, and the City's objection to the Indiana Employees' Public Retirement Fund Board of Trustees' initial determination granting disability benefits to Hash "as being contrary to law" is now overruled.

IT IS FURTHER ORDERED that Respondent City's remaining objections are confirmed for Hearing on Tuesday, November 24, 2009, at 10:00 AM.

SO ORDERED THIS 20TH DAY OF NOVEMBER, 2009.



Jeffrey M. Barr, Administrative Law Judge
949 East Conner Street, Suite 200
Noblesville, IN 46060

Distribution to:

Kathryn Morgan Cimera
General Counsel
143 West Market Street
Indianapolis, IN 46204
kcimera@perf.iin.gov

Allison A. Murphy
Staff Attorney
143 West market Street
Indianapolis, IN 46204
amurphy@perf.in.gov

Michael A. Schoening
Nation Schoening Moll, P.C.
721 E. Broadway
Fortville, IN 46040
mschoening@nsmllaw.com

Matthew G. Langenbacher
Langenbacher Attorney at Law
10142 Carrollton Avenue
Indianapolis, IN 46280
matt@lkindy.com

KD_2405741_1.DOC