

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

|                              |   |                           |
|------------------------------|---|---------------------------|
| IN THE MATTER OF             | ) | 1977 POLICE OFFICERS' AND |
| LEO SCOTT DAGGY.             | ) | FIREFIGHTERS' PENSION AND |
|                              | ) | DISABILITY FUND           |
|                              | ) |                           |
| MISHAWAKA POLICE PENSION     | ) |                           |
| BOARD, Petitioner,           | ) |                           |
|                              | ) |                           |
| v.                           | ) |                           |
|                              | ) |                           |
| LEO SCOTT DAGGY, Respondent. | ) |                           |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was assigned to me on July 9, 2003, to make findings of fact and conclusions of law on the appeal of the Mishawaka Police Pension Board ("Pension Board") from an initial determination of the 1977 Fund Director dated January 27, 2003. The initial determination was made on the appeal of Leo Scott Daggy from the Pension Board's annual review determination of September 27, 2001. The Pension Board determined that Sergeant Daggy continued to suffer from a covered impairment. On Sergeant Daggy's appeal, the Director's initial determination was that Sergeant Daggy no longer suffers from a covered impairment, and is able to return to work as a police officer for the City of Mishawaka ("City").

A hearing was held on March 21, 2003, before Administrative Law Judge T.A. Shula. The case was reassigned to me as substitute on July 9, 2003, see Ind. Code §§ 4-21.5-3-9(e) and -27(e), and counsel for the parties have consented to my review based on a transcript of the hearing and the exhibits admitted at the hearing (without objection unless otherwise noted):

Petitioner's Exhibits:<sup>1</sup>

2. Annual Review of Disability (9/27/01)
3. Fax from L. Scott Daggy to R. Thomas Parker (10/29/01) (1 page)
4. Indiana Code § 36-8-8-13.1
5. Letter from Omkar N. Markand, M.D., to Thomas Parker (12/12/01)
6. Letter from L. Scott Daggy to Pension Board Members (10/31/02)

<sup>1</sup> As noted in the Memorandum dated September 3, 2003, Exhibit 1 was intended to be the transcript of the Pension Board hearing on September 27, 2003. That hearing, however, was not transcribed, and the parties have agreed that I need not review the audio recording of the hearing.

7. Letter from R. Thomas Parker to Chief Anthony Hazen and Leo Scott Daggy (1/27/03)
8. History of the Scott Daggy Case (3/21/03), prepared by attorney Keckley, admitted over objection for limited purpose of expediting testimony of witness R. Thomas Parker

Respondent's Exhibits:

1. Letter from R. Thomas Parker to Leo Scott Daggy (4/4/02)
2. Letter from R. Thomas Parker to Leo Scott Daggy (4/8/02)
3. Cover memo from Jerry W. Schroder (10/18/01), Annual Review of Disability (9/27/01), Letter from R. Thomas Parker to Chief Anthony N. Hazen and Leo Scott Daggy (5/4/01), Notice of Meeting (9/21/01), Sign-in Sheet (9/27/01), Letter from V. Thomas Mawhinney, Ph.D. to Lt. Jerry Schroder (9/14/01), Letter from Michael R. Sheehan, Ph.D. to Thomas Dixon (9/14/01)
4. Letter from Jennifer A. Zimmerman to Thomas Parker (4/17/02)
5. Letter from Thomas M. Dixon to David Keckley (12/18/02)
6. Supplemental Case Report, statement of Jennifer L. Navarre (7/21/00)
7. Supplemental Case Report, statement of Colleen Sherbun (7/22/00)
8. Deposition of V. Thomas Mawhinney, Ph.D. (10/12/00, 10/16/00) (admitted over objection)
9. Letter from V. Thomas Mawhinney to Chief Anthony A. Hazen (8/7/00)
10. Letter from William Bailey Jones III, M.D., to Thomas M. Dixon (1/23/03)

In addition, I have reviewed a copy of the PERF Board's file, which includes many documents that were referred to by the parties at the hearing. For example, the file includes an assessment by Lolita O. Ang, M.D. (3/21/02) and other letters from Dr. Markand (3/12/01, 3/29/02) that were once attached to Mr. Parker's initial determination but are not attached to Petitioner's Exhibit 7. Similarly, the file includes three pages of attachments that are not attached to Petitioner's Exhibit 3.

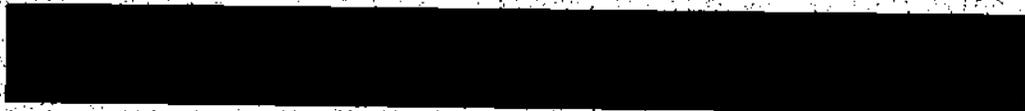
At the conclusion of the hearing the parties submitted written briefs. From the Pension Board's objections and the briefs, two questions are presented for resolution:

1. Whether the PERF Board had jurisdiction to issue the initial determination of January 27, 2003, or whether jurisdiction was vested in the Pension Board at that time?
2. If there was jurisdiction, whether the evidence supported the initial determination of the PERF Board director that Sergeant Daggy is no longer disabled?

**FINDINGS OF FACT**

**Procedural History**

- July 5, 1989 Leo Scott Daggy began employment as a police officer for the City of Mishawaka, and a member of the 1977 Police Officers' and Firefighters' Pension and Disability Fund. By 2000 he attained the rank of sergeant.
- June 26, 2000 Sgt. Daggy was admitted to Madison Center and Hospital for treatment of [REDACTED]
- December 5, 2000 Sgt. Daggy and City of Mishawaka reached an agreement that disciplinary charges against him would be dismissed and the question of his disability to return to work submitted to the Mishawaka Police Pension Board.
- December 8, 2000 Pursuant to the agreement, Sgt. Daggy completed an Application for Disability Benefits.
- December 21, 2000 The Pension Board began its hearing and adjourned. Examinations were conducted by attorneys Thomas M. Dixon for Sgt. Daggy, and J. David Keckley for the Pension Board.
- February 7, 2001 The Pension Board resumed the hearing. In addition to the attorneys who appeared previously, the City was represented by a deputy city attorney.
- February 16, 2001 The Pension Board voted four to two to find that Sgt. Daggy had a covered impairment, [REDACTED]
- March 5, 2001 The City certified Sgt. Daggy's Application for Disability Benefits.
- March 12, 2001 Omkar N. Markand, M.D., PERF Medical Consultant, reported to R. Thomas Parker, Director of the 1977 Fund, that he had reviewed the medical records and in particular the differing assessments of William Jones, M.D., and V. Thomas Mawhinney, Ph.D. Dr. Markand concluded that Sgt. Daggy suffered from [REDACTED] and probably [REDACTED]. He recommended "temporary disability" for six months during which he should pursue treatment by a psychiatrist, after which Dr. Markand would review the report of the treating psychiatrist.
- May 4, 2001 Director Parker, acting by delegation of the PERF Board, determined that Sgt. Daggy was eligible for disability benefits, and that there was no suitable and available work within the Mishawaka Police Department, effective retroactively to October 19, 2000. This approval was subject to review of the impairment by September 2001, a recommendation that Sgt.



September 27, 2001 The Pension Board held a hearing to review Sgt. Daggy's status and determined, by a vote of four to one, that he continued to have a covered impairment and that there was no suitable and available work for him.

October 18, 2001 Pension Board secretary Jerry W. Schroder prepared a handwritten, unaddressed cover sheet dated "10-18-01" which "submitted" the attached Pension Board determination that was received by PERF. There is no evidence of when it was sent or received. It must have been received before December 12, 2001, the date of Dr. Markand's initial report (see below). Based on his normally quick turnaround time, he probably received the assignment from PERF in the first week of December.

October 29, 2001 Sgt. Daggy sent a fax to Director Parker entitled "Objection to Local Pension Board Ruling." The fax included a letter from the dissenting member of the Pension Board and two health care providers (Dr. Sheehan and Dr. Jones).

December 12, 2001 Dr. Markand reported to Director Parker that he reviewed information received since his earlier letter, and in light of the conflicting assessments of other professionals, recommended that Sgt. Daggy be given an



March 5, 2002



March 21, 2002 Based on her examination of Sgt. Daggy on March 20, 2002, Dr. Ang recommended to Director Parker that Sgt. Daggy be allowed to return to work.

March 29, 2002 Dr. Markand supplemented his earlier letters, recommending that Sgt. Daggy be permitted to return to work as a police officer without



April 4, 2002 Director Parker notified Sgt. Daggy, Pension Board and City that a hearing before an administrative law judge would be held on "Wednesday, April 19, 2002," to hear Sgt. Daggy's appeal of the Pension Board's determination.

April 8, 2002 A corrected notice was sent clarifying that the hearing would be held on Friday, April 19, 2002.

- April 17, 2002 Assistant City Attorney Jennifer Zimmerman faxed a letter to Director Parker requesting that the April 19 hearing be "continued to a later date" because the City needed more time to prepare, but also requesting that the matter be "remanded to the Local Board for a new hearing and review." She stated that at Sgt. Daggy's "first hearing," at which "Sgt. Daggy was the applicant and the City was not a party, relevant evidence was not presented."<sup>2</sup> She expressly referred to the provision for annual review by the local board. Ms. Zimmerman's letter was copied to the City's Mayor and Police Chief.
- April 18, 2002 Director Parker notified the parties that, at the request of the Mishawaka Legal Department, the hearing scheduled for April 19, 2002, had been cancelled and had not been rescheduled. Although he did not say so in the letter, Director Parker believed that the local review process was not complete and the Pension Board would be undertaking further review.
- October 31, 2002 Sgt. Daggy sent a letter to the Pension Board requesting a hearing pursuant to Ind. Code § 36-8-8-13.7 within 90 days.
- December 18, 2002 Attorney Dixon notified Pension Board attorney Keckley that Sgt. Daggy formally rescinded his October 31, 2002, request for a hearing by the Pension Board, and requested that the matter be placed on the calendar of the PERF administrative law judge.
- January 17, 2003 A hearing before the administrative law judge was scheduled for January 30, 2003.
- January 27, 2003 Director Parker sent a letter determining that Sgt. Daggy was no longer eligible for disability benefits. The letter included a notice that any objection to this initial determination must be made within 15 days of receipt of the notice.
- January 29, 2003 Director Parker sent notice confirming that the January 30 hearing had been cancelled.
- February 17, 2003 Pension Board filed its Objection to Initial Determination by PERF Board.

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<sup>2</sup> It is not clear what Ms. Zimmerman meant by her reference to a "first hearing" at which the City was not a party. As noted above, the City was represented at the continuation of the initial Pension Board hearing on Sgt. Daggy's application. While the City did not send an attorney to the annual review hearing on September 27, 2001, notice of that hearing was sent to the Mayor and the City's Corporation Counsel, John P. Gourley. Moreover, the City's police chief sat as a member of the Pension Board.

March 21, 2003 Hearing held before PERF administrative law judge.

July 9, 2003 Matter reassigned to undersigned administrative law judge.

**Existence of Covered Impairment**

This case is less a case of contested facts than it is a case of contested expert opinions. The following findings summarize the key points of hundreds of pages of testimony, but necessarily omit a large amount of detail.

[REDACTED]

[REDACTED]

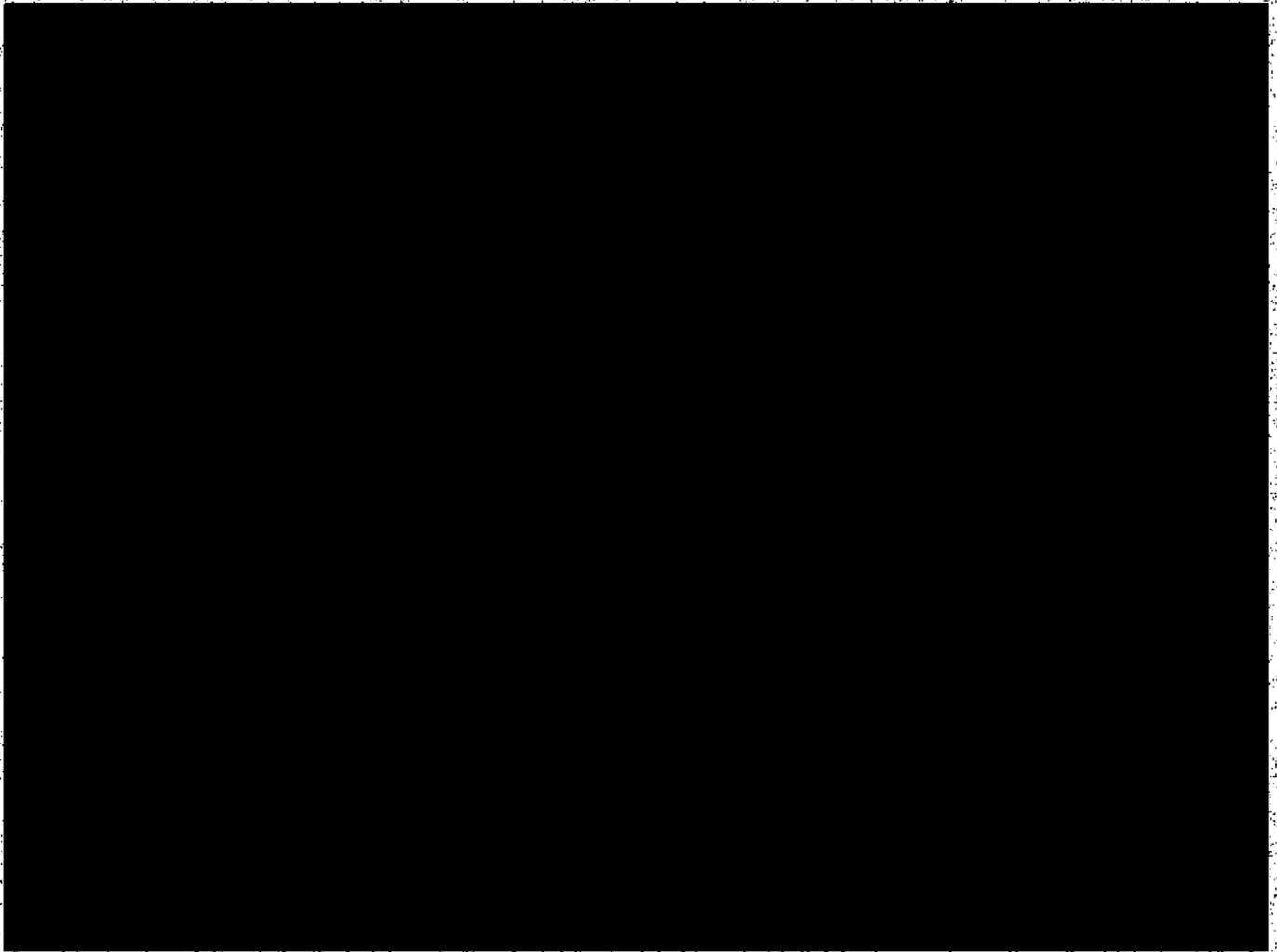
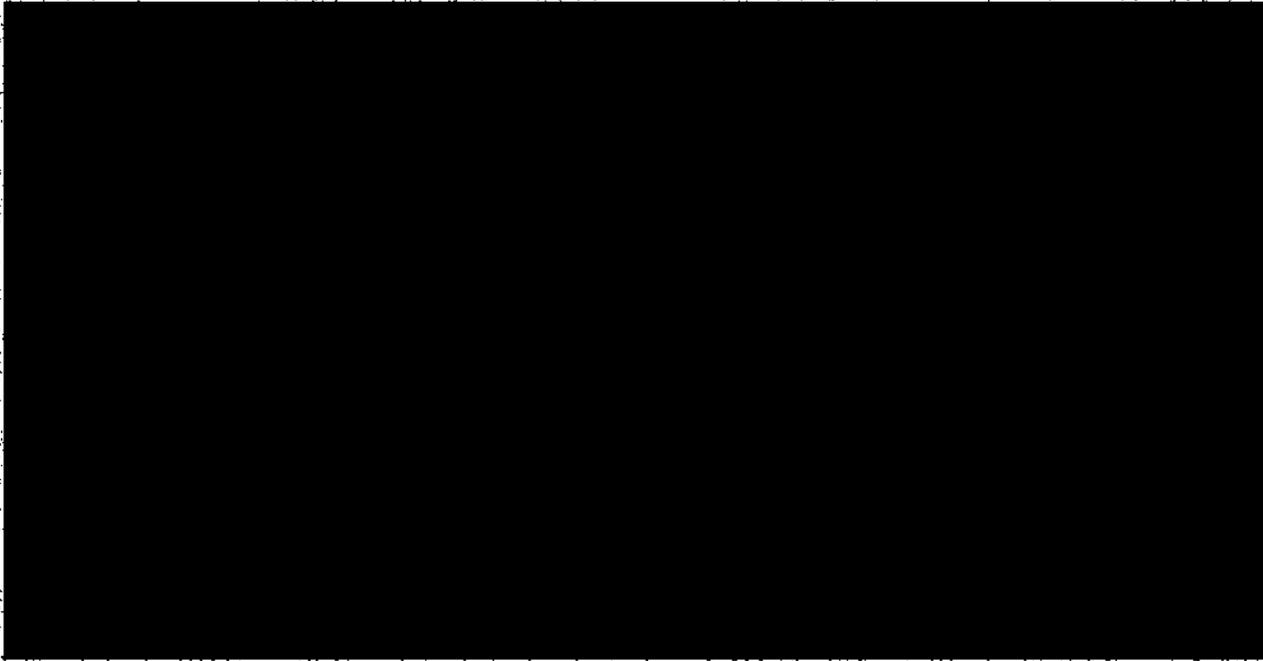
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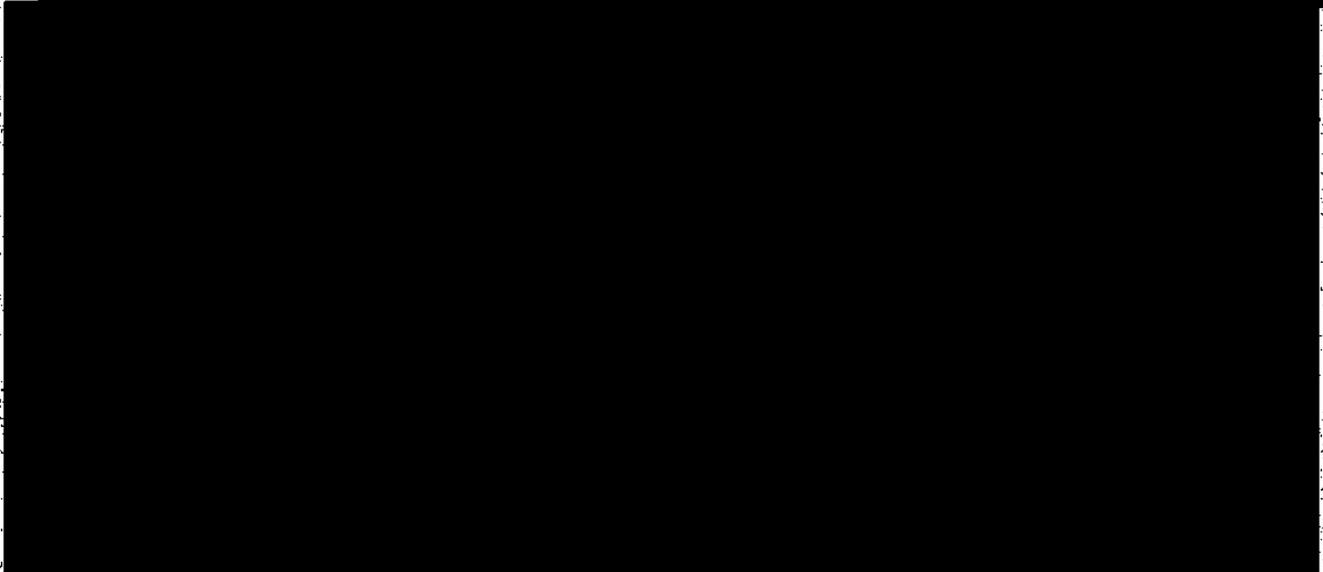
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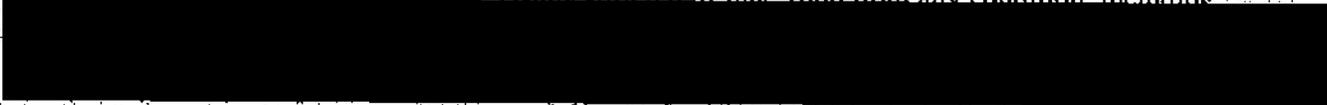
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26. To the extent that Sgt. Daggy suffered in June 2000 from any condition, including



27. Any conclusion of law set forth below that should have been designated as a finding of fact is incorporated by reference.

### CONCLUSIONS OF LAW

#### Jurisdiction of PERF and Procedural Status

1. Sgt. Daggy's disability was reviewed by the Pension Board under Ind. Code § 36-8-8-13.7. The Pension Board found on September 27, 2001, that Sgt. Daggy continued to suffer from a covered impairment. Review of that determination is governed by Ind. Code § 36-8-8-13.1.

2. Section 36-8-8-13.1(a) provides that the determination must be submitted to the PERF board's director under two circumstances: (a)(1) if the local board finds that a covered impairment exists and the safety board determines that there is no suitable and available work, or (a)(2) the fund member files an appeal under § 36-8-8-12.7(o).

3. The member may appeal the local board's determination to the PERF board within 30 days after he received a copy of the determination. Ind. Code § 36-8-8-12.7(o). The thirtieth day after September 27, 2001, was Saturday, October 27, 2001, so Sgt. Daggy's appeal filed on Monday, October 29, 2001, was timely regardless of when he received the determination. See Ind. Code § 4-21.5-3-2 (computation of time).

4. The determination in this case was subject to review under both subsections (a)(1) and (a)(2) of § 36-8-8-13.1, because the local board found the continued existence of a covered impairment and the member appealed. This is important for reasons explained below.

5. After the PERF board's director receives the local board's determinations, the fund member must submit to examination by a medical authority selected by the PERF board. Ind. Code § 36-8-8-13.1(b). The director "shall review the medical authority's report and the local board's determinations and issue an initial determination within sixty (60) days after receipt of the local board's determinations." Ind. Code § 36-8-8-13.1(c).

6. Director Parker received the Pension Board's determination sometime before December 12, 2001, when PERF's medical consultant, Dr. Markand, issued his recommendation that Sgt. Daggy be evaluated [REDACTED]. Director Parker did not make an initial determination within 60 days after December 12, 2001.

7. Director Parker was incapable of making an initial determination because he did not yet have the medical authority's report. The appointment for the independent evaluation did not occur until March 20, 2002, which was only one day later than originally scheduled. Dr. Ang issued her findings on March 21, 2002, and Dr. Markand issued his final report on March 29, 2002.

8. Without issuing an initial determination, Director Parker promptly set the case for hearing on April 19, 2002. That hearing was cancelled based on the representations of the City that further proceedings would take place at the local level.

9. Under the peculiar circumstances presented by this case, the 60-day time limit is a "directory" time limit that can be overlooked without violating legislative intent. Courts find some time limits to be directory in nature, but only where the General Assembly has not attached specific penalties or consequences to expiration of the time limit. For example, in United Rural Electric Membership Corp. v. Indiana & Michigan Electric Co., 549 N.E.2d 1019 (Ind. 1990), the electric company filed a petition to modify service area boundaries beyond a date set by statute for such petitions. The company argued that the deadline was directory because there were no explicit consequences for an untimely petition. The court found, however, that the statute provided "a valid and ready provision to apply" when the parties acted outside the deadlines, and that the time limit was therefore mandatory and jurisdictional. 549 N.E.2d at 1023. In the absence of consequences, however, time limits are directory and do not deprive an administrative agency of jurisdiction. State v. Langen, 708 N.E.2d 617, 621-22 (Ind. App. 1999) (deadline for ruling by state commission was directory where statute did not provide for consequences of late ruling and legislature clearly did not intend to deprive commission of ultimate authority to issue order); Hancock County Rural Electric Membership Corp. v. City of Greenfield, 494 N.E.2d 1294 (Ind. App. 1986) (statute requiring commission to rule in 90 days

was directory where statute neither restrained the commission from acting after 90 days nor specified adverse or invalidating consequences).

10. Section 36-8-8-13.1(c) provides consequences for the failure to issue an initial determination within 60 days, but those consequences in this case are not "ready to apply" because they are inherently contradictory. That section provides that if review was initiated under subsection (a)(1), the determinations of the local board and chief of the police department are treated as the initial determination. If review was initiated by the member's appeal under subsection (a)(2), the member's statements in support of his appeal become the initial determination. As noted above, review of the local board's determination in this case was under both of the subsections, because the local board found a covered impairment and the member appealed. Clearly the legislature did not contemplate the possibility that a member would appeal a finding of disability, but that is what occurred here.

11. Because the local board's findings and Sgt. Daggy's statements in support of his appeal state opposite conclusions, neither can be rightly deemed PERF's initial determination. Lacking a clear, ready-to-apply consequence of noncompliance with the 60-day time limit, that limit must be considered directory. Therefore, the PERF board retained authority to review the local board's decision.

12. This result is confirmed by considering legislative intent. Employee benefit laws are liberally construed in favor of the employees intended to benefit by them. See Wernle, Ristine & Ayers v. Yund, 790 N.E.2d 992, 995 (Ind. 2003) (worker's compensation). This explains why § 36-8-8-13.1(c) defaults to a determination that the member is disabled, based on the apparent assumption that the member wants to receive disability benefits.

13. In a case where the member is contesting a finding of disability, that bias falls away and is replaced by the fact that the legislature has set up the PERF board as an ultimate arbiter of local disputes. To take away the PERF's board's authority to resolve such disputes would be contrary to legislative intent, particular where delay cannot be attributed to the member who sought review. It would be unjust to hold that a party appealing from a decision loses that appeal because of the appellate tribunal's failure to act in a timely fashion.

14. Because Director Parker did not issue an initial determination after he received the medical authority's final report in March 2002, the 15-day and 180-day time limits of Ind. Code § 36-8-8-13.1(d) were not triggered. Even if they had been, the same problem presents itself because the consequence under subsection (d), in this case, is that both the local board's determination and the member's statements in support of review become the final order.

15. The result is unchanged by the events of April 2002, when the City acted unilaterally to cancel the PERF board's hearing by its representation that further medical evidence needed to be considered by the local board. This representation was at best an unkept promise, because the record shows no efforts by the City or the local board to undertake further review. Any fault for the delay from April 2002 to January 2003 lies at the feet of the City.

16. The result is also not changed by the fact that Sgt. Daggy, understandably confused about the status of the case, sought annual review in October 2002. When it became clear that

the PERF board had never completed its review of the September 2001 findings, it was appropriate for Sgt. Daggy to rescind his request and move forward.

17. Director Parker's issuance of an initial determination on January 27, 2003, served to clarify the situation and move the case to the next stage after PERF's medical authority recommended that Sgt. Daggy was no longer disabled. The Pension Board timely appealed the initial determination, and the case was properly heard on March 21, 2003.

18. For these reasons, the Pension Board's first objection, that the PERF board lacks jurisdiction to review the Pension Board's findings of September 27, 2001, is incorrect as a matter of law.

#### Existence of Covered Impairment

19. The factual questions presented by this case are reviewed under the preponderance of the evidence standard. Pendleton v. McCarty, 747 N.E.2d 56, 64-65 (Ind. App. 2001). The administrative law judge, even where not the ultimate authority, performs a role similar to that of a trial judge sitting without a jury, and reviews the evidence de novo, without deference to the agency's initial determination. Indiana Department of Natural Resources v. United Refuse Company, Inc., 615 N.E.2d 100, 103-04 (Ind. 1993); Branson v. Public Employees' Retirement Fund, 538 N.E.2d 11, 13 (Ind. App. 1989).

20. "A covered impairment is an impairment that permanently or temporarily makes a fund member unable to perform the essential function of the member's duties, considering reasonable accommodation to the extent required by the Americans with Disabilities Act, with the police or fire department." Ind. Code § 36-8-8-12.3(b). See Board of Trustees of Public Employees Retirement Fund v. City of Plymouth, 698 N.E.2d 335, 336-37 (Ind. App. 1998).

21. Based on the foregoing Findings of Fact, the preponderance of the evidence is that Sgt. Daggy no longer suffers from any condition that would render him unable to perform the essential functions of his duties as a member of the Mishawaka Police Department. As a matter of law, therefore, he does not suffer from a covered impairment.

22. Because he does not suffer from a covered impairment, Sgt. Daggy is no longer disabled or entitled to disability benefits from the 1977 Fund.

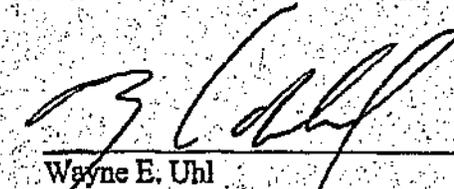
23. The Pension Board's objection that the PERF board director's initial determination is not supported by substantial evidence is without merit.

24. Any finding of fact that should have been designated as a conclusion of law is incorporated by reference.

**CONCLUSION**

Based on the foregoing findings of fact and conclusions of law, the PERF Board Director's initial determination should now become the final order of the PERF Board.

DATED: September 5, 2003.




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Wayne E. Uhl  
 Administrative Law Judge  
 Indiana Public Employees' Retirement Fund

**STATEMENT OF AVAILABLE PROCEDURES FOR REVIEW**

The undersigned administrative law judge is not the ultimate authority, but was designated by the PERF Board to hear this matter pursuant to Ind. Code § 4-21.5-3-9(a). Under Ind. Code § 4-21.5-3-27(a), this order becomes a final order when affirmed under Ind. Code § 4-21.5-3-29 which provides, in pertinent part:

(b) After an administrative law judge issues an order under section 27 of this chapter, the ultimate authority or its designee shall issue a final order:

- (1) affirming;
- (2) modifying; or
- (3) dissolving;

the administrative law judge's order. The ultimate authority or its designee may remand the matter, with or without instructions, to an administrative law judge for further proceedings.

(c) In the absence of an objection or notice under subsection (d) or (e), the ultimate authority or its designee shall affirm the order.

(d) To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that:

- (1) identifies the basis of the objection with reasonable particularity; and
- (2) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner.

(e) Without an objection under subsection (d), the ultimate authority or its designee may serve written notice of its intent to review any issue related to the order. The notice shall be served on all parties and all other persons described by section 5(d) of this chapter. The notice must identify the issues that the ultimate authority or its designee intends to review.

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of this Findings of Fact and Conclusions of Law on the following persons, by U.S. Postal Service Priority Mail, postage prepaid, on September 5, 2003:

J. David Keckley (also by fax)



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Leo Scott Daggy



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