JOURNAL OF:

Illinois Local Government Lawyers Association

By and for Illinois Attorneys

December 2017 ■ Vol. 15, No 10 ■ WW.ILGL.US

IMPERMISSIBLE CONFLICTS OF INTEREST IN ADMINISTRATIVE PROCEEDINGS

By: Paul L. Stephanides

Introduction

At various times, local government boards and commissions sit as administrative hearing bodies. This can raise conflicts of interests and bias issues for individual members. This article addresses some of those concerns in light of recent case law.

Due Process Applicable to Administrative Proceedings

An administrative proceeding is governed by the fundamental principles and requirements of due process of law under the Federal and Illinois Constitutions (U.S. Const., amend. XIV; Ill. Const. 1970, art. I). *Williams v. Board of Trustees of the Morton Grove Firefighters' Pension Fund,* 398 Ill.App.3d 680, 691, 338 Ill.Dec. 178, 924 N.E.2d 38 (1st Dist. 2010); *Waste Management Illinois, Inc. v. Pollution Control Board*, 175 Ill.App.3d 1023, 1036, 125 Ill.Dec. 524, 530 N.E.2d 682 (2nd Dist. 1988). Due process is a flexible concept and requires such procedural protections as the particular situation demands. *Waste Management Illinois, Inc.*, 175 Ill.App.3d at 1036.

A proceeding must be conducted "in a fundamentally fair manner." *Millineum Maintenance Management v. County of Lake*, 384 Ill.App.3d 638, 646-647, 323 Ill.Dec. 819, 894 N.E.2d 845 (2nd Dist. 2008). There must be no actual or apparent bias in the conduct of the proceeding as stated by the Illinois Supreme Court:

> It is a classical principle of jurisprudence that no man who has a personal interest in the subject matter of decision in a case may sit in judgment on that case.
>
> The principle is as applicable to administrative agents, commissioners, referees, masters in chancery, or other arbiters of questions of law or fact not holding judicial office as it is to those who are technically judges in the full sense of the word.

In re Heirich, 10 Ill.2d 357, 140 N.E.2d 825 (1956). "A personal interest or bias can be pecuniary or any other interest that may have an effect on the impartiality of the decisionmaker" *Huff v. Rock Island County Sheriff's Merit Commission*, 294 Ill.App.3d 477, 481, 228 Ill.Dec. 738, 689 N.E.2d 1159 (3rd Dist. 1997).

Illinois courts favor a strong presumption of honesty and integrity in the decisions of adjudicators. *Naden v. Firefighters Pension Fund of the Sugar Grove Fire Protection District*, 2017 IL App (2d) 160698 ¶ 10. To overcome this presumption, a party must prove that the proceedings were "tainted by dishonesty or contained an unacceptable risk of bias" against a party. *Id.* (citations and quotations omitted). "If one decision maker on an administrative body is not completely disinterested, his participation infects the action of the whole body and renders the resulting decision unsustainable." *Id.* (citations and quotations omitted).

Conflicts of Interest Per Se

A conflict of interest can arise that is not due to the conduct of a hearing, but rather due to the members that sit on a board having a conflict of interest per se. The case of *Naden v. Firefighters Pension Fund of the Sugar Grove Fire Protection District* cited above and released on November 17, 2017, provides an example of such a case.

The plaintiff Sara Naden was a lieutenant with the fire protection district. She applied for a disability pension with the firefighters' pension board and the board ruled against her finding she was not disabled. Naden testified before the Board that she was subjected to "intense criticism, ridicule and sexual harassment by her male coworkers – both her subordinates and her superiors – over many years." This caused her panic attacks for which she sought treatment. Eventually, she requested FMLA leave citing her anxiety and treatment by her coworkers. The fire protection district asked her to submit a written complaint regarding her sexual harassment allegations and granted her 12 weeks FMLA leave.

Naden prepared a 16-page single-spaced written report in which she described dozens of incidents, many of which described harassment by three of the five members of the pension board. Naden did not return from her FMLA leave and she applied for workers' compensation benefits, filed a claim of sex discrimination with the Equal Employment

Opportunity Commission and applied for the disability pension that was the subject of the pension board decision. The fire protection district issued Naden a "Notice of Interrogation," but that interrogation did not occur as of the release of the appellate court's decision.

The pension board argued that the pension hearing did not violate Naden's due process rights and the court stated that if the disciplinary interrogation would have been resolved by the fire protection district before the hearing, the pension board would have been in a much better position to make this argument. On this point, the court distinguished the case of *Kramarski v. Board of Trustees of the Village of Orland Park Police Pension Fund,* 402 Ill.App.3d 1040, 341 Ill.Dec. 954, 931 N.E.2d 851 (1st Dist. 2010).

In *Kramarski*, a police officer's application for a disability pension was denied and the appellate court rejected her claim that two of the pension board members were biased against her because they were named in the officer's lawsuit over her termination. The lawsuit was settled without a decision on the merits before the pension board hearing and the two allegedly biased members abstained from voting on the application. In *Naden*, the disciplinary interrogation was unresolved and ongoing meaning that there was a "running controversy" between Naden and the three pension board members. The court stated:

> Here, Naden's departmental disciplinary claims were pending long before the three trustees sat in judgment of her pension application. Thus, each of the three trustees named in Naden's complaint had a material, direct, personal interest in denying her disability claim, whether to discredit or retaliate against her. The degree of bias rendered the Board's decision unsustainable; it is therefore vacated.

Naden, 2017 IL App (2d) 160698 ¶ 15.

Despite the court's analysis of the *Kramarski* case, it is still not entirely clear how the court would have ruled if Naden's claims had been resolved. If any or all of the three pension board members had been disciplined as a result of her claims, the animus and resulting bias with regard to these disciplined members would in theory be greater. The same could be said if Naden's claims did not result in discipline and the members for example felt that they had been unfairly targeted. The manner by which the *Naden* court distinguished *Kramarski* may be of little or no precedential value, especially considering that *Naden* originates from the Second District Appellate Court and Kramarski is a First District Appellate Court case. The *Naden* decision may in fact be more groundbreaking and far reaching than the court envisioned and could open hearing bodies up to significantly more claims of due process *per se* conflicts of interest.

There are two immediate takeaways from the *Naden* decision. First, if there is a disciplinary or other adversarial matter between an applicant and members of a particular board or commission that has the authority to issue a decision on the application pursuant to a hearing, the adversarial matter must be resolved at the time of the hearing. Otherwise, a due process conflict of interest would result rendering the decision subject to being vacated and requiring a new hearing. Second, the members of the board or commission who are the subject of the disciplinary or other adversarial matter should abstain from voting on the decision at a minimum or recuse themselves altogether if the adversarial matter is resolved. This may result in there not being enough members of a particular board or commission sufficient to provide a majority vote on a matter. The court decisions do not give guidance on what course of action a board or commission must take in such a situation.

A *per se* conflict of interest can also arise where a member of a hearing body is also a witness at the applicable hearing. This occurred in the case of *Girot v. Keith,* 212 Ill.2d 372, 289 Ill.Dec. 29, 818 N.E.2d 1232 (2004). In *Girot*, an electoral board was charged with hearing an objection to the nominating petitions of a candidate for mayor. The candidate filed his petitions with the city clerk and the objector based one of his objections on the manner by which the petition sheets were bound. The city clerk sits on the electoral board by statute, 10 ILCS 5/10-9(3), and the candidate moved to have her replaced because she would have to testify regarding the manner in which his petition sheets were bound. The electoral board denied the motion.

The Illinois Supreme Court held that the city clerk had a *per se* conflict of interest. The Court stated that "there is an inevitable bias when a fact finder is evaluating her own credibility. *Id.*, 212 Ill.2d at 381. This amounts to a *per se* conflict

because there is an "unacceptable risk of bias." *Id.* (citation omitted).

Conflicts of Interest due to Bias in the Manner a Hearing is Conducted

A conflict of interest can also arise due to bias that is evident in the manner in which a hearing is conducted. This occurred in the case of *Williams v. Board of Trustees of the Morton Grove Firefighters' Pension Fund,* 398 Ill.App.3d 680, 338 Ill.Dec. 178, 924 N.E.2d 38 (1st Dist. 2010). The plaintiff firefighter in *Williams* filed an application for a disability pension. The pension board that heard the case consisted of three firefighters, the president of the Morton Grove Board of Trustees, the village clerk, the village attorney, the village treasurer and the fire department chief.

The court ruled that the participation of municipal officials did not create a *per se* conflict of interest. *Id.*, 398 Ill.App.3d at 692. The court did however rule that certain actions of the village attorney during the hearing evidenced bias and created an impermissible conflict of interest. The village attorney had an *ex parte* contact with an attorney for the village who participated in the proceeding by providing a copy of the Board's exhibits to her. She also raised her own objections to questions posted by the plaintiff's counsel, made her own motions during the proceeding and extensively questioned witnesses. The attorney asked 45 substantive and uninterrupted questions of one of the applicant's treating physician. The court found this significant, "Although many of the other Board members asked questions during the hearing, not one of the other Board members conducted such a thorough and uninterrupted examination of any of the witnesses." *Id.* at 694.

The court ruled that the attorney was "advocating on behalf of the village rather than acting as a disinterested decisionmaker" and that "[h]er actions infected the whole proceedings and denied plaintiff a fair and impartial hearing." *Id.* at 694-95. The court remanded the case to the pension board for a new hearing.

In the case of *Danko v. Board of Trustees of the City of Harvey Pension Board,* 240 Ill.App.3d 633, 181 Ill.Dec. 260, 608 N.E.2d 333 (1st Dist. 1992), the chair of a pension board was also the applicant's former boss. The chair was intricately involved in the events leading up to the hearing, although he was not a witness at the hearing unlike the city clerk in the *Girot* case, and during the hearing he called the applicant a "liar." *Id.*, 240 Ill.App.3d at 643. The chair also asserted during the hearing that the applicant should have taken a light-duty position the chair had offered. These circumstances amounted to bias that violated the applicant's right a to a fair hearing. The court emphasized that the chair's remarks made during the hearing were instrumental in its decision. The court stated that the chair's intimate involvement in the case was not enough to show bias, but that combined with his statements made during the hearing demonstrated "that he was not able to judge the controversy fairly on the basis of its own circumstances." *Id.* at 644.

Conflict of Interest due to Ex Parte Communications

Finally, local government hearing bodies can open themselves up to due process claims to communications and activities that occur outside the hearing, including *ex parte* communications. *Ex parte* communications with members of the hearing board in their adjudicative roles are improper. *Waste Management Illinois, Inc. v. Pollution Control Board*, 175 Ill.App.3d 1023, 1043 (2nd Dist. 1988). A party can make a claim that a proceeding was fundamentally unfair if there were *ex parte* communications by decision makers that show bias and that a matter was pre-judged. *Stop the Mega-Dump v. County Board of DeKalb County, et al.*, 2012 IL App (2d) 110579 ¶¶ 55-56; *Peoria Disposal Company v. Illinois Pollution Control Board and County of Peoria*, 385 Ill.App.3d 781, 798 (3rd Dist. 2008). A court may reverse a public body's decision if the complaining party shows it suffered prejudice as a result of those communications. *Stop the Mega-Dump,* 2012 IL App (2d) 110579 ¶ 54.

Courts allow latitude with *ex parte* communications, as discussed by the court in the *Peoria Disposal* case cited above. In that case, Peoria County denied an application to expand a regional landfill. The court stated:

> Because of the nature of siting proceedings, courts have long recognized that it is inevitable that some *ex parte* communication will occur between the public and the members of the local siting authority. That recognition comes from an understanding of the realities of the situation – that members of the local

> siting authority are not judges but, rather, locally elected officeholders on municipal or county boards. As such, they are constantly bombarded with the concerns of their constituents. The public may not be aware of or understand in a local siting proceeding, their elected representatives are acting in an adjudicatory role and that *ex parte* communication, therefore, is improper. A reviewing court will not reverse an administrative agency's decision because members of the agency have received improper *ex parte* communications without a showing that the complaining party suffered prejudice as a result of those communications.

Peoria Disposal Company v. Illinois Pollution Control Board and County of Peoria, 385 Ill.App.3d at 798 (citations and quotations omitted). The extent to which a court will grant leeway for *ex parte* as pronounced in the *Peoria Disposal* is unknown for other types of administrative hearing cases, such as the hearings on the pension applications at issue in the *Naden* and *Williams* cases. The court in the *Williams* case placed emphasis on the *ex parte* communication that took place between the village attorney and the attorney that represented the village in the pension board proceeding, but it was not the determining factor in that case. There currently is no Illinois reported decision that provides guidance on the amount of prejudice a party must suffer due to *ex parte* communications for a court to rule that there has been a due process conflict of interest violation requiring a new hearing.

Conclusion

A local government hearing body may violate a party's due process right to a fair hearing in numerous ways both outside a hearing and in the manner by which a hearing is conducted. The case law continues to evolve and the careful practitioner on behalf of a board or commission will need to evaluate whether a conflict of interest arises outside of a hearing based upon the facts of each individual case, and the practitioner should closely monitor the manner by which a hearing is conducted to prevent a finding of impermissible bias.

About the Association...

The ***Illinois Local Government Lawyers Association*** is a membership association of attorneys who represent local governments throughout Illinois. It was formed in 1991 to coordinate and promote professional education, information exchange and interaction among local government attorneys in Illinois in order to ensure the highest level of professional representation to units of local government.

The **Association** is incorporated as a not-for-profit corporation under Illinois law. It is designed to serve the needs of the practicing local government attorney with membership open to attorneys licensed to practice law in Illinois and actively representing local government. The mission statement of the **Association** provides:

*"It is the purpose of the **Illinois Local Government Lawyers Association** to coordinate and promote professional education, information exchange and interaction among local government attorneys in Illinois in order to insure the highest level of professional representation to units of local government."*

We seek your membership in and support for this organization. The ongoing purpose of the Association is to serve as a conduit for timely dissemination of information to the attorney who is practicing in active representation of local government. The Association is organized on a statewide basis and operated in such a manner that its benefits are efficiently and geographically available to members in each judicial circuit.

The Association provides a means of communicating current developments through its publications, but most importantly provides an open forum for exchange of ideas and "no holds barred" discussion of issues or problems that you may be dealing with on behalf of your client cities, villages, counties, townships and other units of government. We are confident you will find this to be a valuable resource to you in advising your local government clients.