

**MINUTES OF THE LADY LAKE
SPECIAL POLICE PENSION BOARD MEETING
LADY LAKE, FLORIDA
September 22, 2015**

The Police Pension Board meeting was held in the Town Hall Commission Chambers at 409 Fennell Blvd., Lady Lake, Florida.

MEMBERS PRESENT: Chairperson/Member Capt. Jason Brough; Member Capt. Robert Tempesta; Member Leonard Cieciek; and Member Pete Chiasson

MEMBERS ABSENT: Member John Schmied

TOWN STAFF PRESENT: Kris Kollgaard, Town Manager; Derek Schroth, Town Attorney; Pam Winegardner, Acting Finance Director; Tia O'Neal, Human Resource Director; Chris McKinstry, Police Chief; and Nancy Slaton, Deputy Town Clerk

ALSO IN ATTENDANCE: Scott Christiansen of Christiansen & Dehner, P.A.; Attorney Paul Kelley; Rita Boice; Sandra McAuley, Workers Comp Attorney; Mayor Ruth Kussard and Commissioner Tony Holden

1. ROLL CALL/CALL TO ORDER: Chairperson Brough called the special meeting to order at 2:30 p.m.

2. PUBLIC COMMENT

Chairperson Brough asked if anyone in the audience had any comments or questions. There were no questions or comments.

3. Approval of the FY 2015-2016 Administrative Budget for the Police Pension Plan (Pam Winegardner, Acting Finance Director)

Chairperson Brough asked for a motion regarding the FY 2015-16 administrative budget for the Police Pension Plan.

Upon a motion by Member Tempesta and a second by Member Cieciek, the Board approved the FY 2015-16 Administrative Budget for the Police Pension Plan as presented by a vote of 4-0.

4. Hearing Regarding the Disability Claim for Rita Boice

Scott Christiansen of Christiansen & Dehner, P.A. stated that this is the disability hearing for Rita Boice. He noted for the record that Ms. Boice is present and is represented by her attorney, Paul Kelley.

Mr. Christiansen reviewed the rules of procedure for this quasi-judicial proceeding, stating they are conducted under Rule #14 – Operating Rules adopted by the Board. He stated it provides for the processing of disability claims which begins with the filing of an application for a disability pension, with a letter attached from a doctor wherein the doctor indicates that the individual is totally and permanently disabled and unable to perform the duties of a police officer. Once the application is filed, the applicant is then sent an interrogatory questionnaire about the nature of the disability; when and how it occurred, and whether there was a pre-existing condition. It also includes questions about all healthcare providers.

Mr. Christiansen stated a number of medical authorization forms are also sent to the claimant which have the claimant acknowledge the fact that records will be collected and that the records will be reviewed at a public hearing and will become subject to public inspection if requested. He noted that he does not typically get requests for that information. The forms also authorize any doctors and healthcare providers to provide copies of records to the Board. All of the records are collected by the Board's attorney's office, including personnel records from the Town, and then an Independent Medical Evaluation (IME) appointment is set up for the claimant with a doctor who has expertise in the area in question; in this case, an orthopedic surgeon. This doctor is provided with a copy of all of the records and completes his own examination of the claimant, and then provides his opinion of the case.

Mr. Christiansen stated that the claimant is informed that he has the burden of proving the right to the disability claim. The claimant is also provided a copy of all the records, and as such, can review and notify the attorney's office if anything is missing or if the claimant feels something is not right.

Mr. Christiansen stated the doctor performing the IME is provided with a list of specific questions from his office in order to assist the Board with making a determination on the claim, and receives all of the records to review all treatment that has occurred. Once the IME report is received by the attorney's office, an initial, informal hearing is scheduled and a notice is sent to the claimant, and the Board members are provided with a copy of all the records to review. He stated that the Board has three choices at this hearing:

- 1) The Board finds that all the criteria is established by the records to grant the disability pension effective today.
- 2) The Board finds that one or more criteria has not been established by the records provided and the claim is denied. The claimant would have a right to request a formal evidentiary hearing before this board and may obtain additional statements/affidavits from a doctor, and attorneys may obtain depositions. Testimony could be heard at a formal evidentiary hearing as a result.
- 3) The Board identifies that they need additional information or explanation, in which case the Board could recess today with the approval of the claimant and come back at another time for the initial hearing.

Mr. Christiansen stated that if there was a formal evidentiary hearing, the Board would have the same three choices, and if the claim was approved at that hearing, the pension would become effective the same date. If the claim was denied again, the claimant has the right to appellate proceedings at the circuit court level and the case would be reviewed by virtue of a Petition for Writ of Certiorari. This is allowed if the claimant feels the Board did something wrong or made a procedural error, etc., and can appeal their decision in front of a circuit court judge, although no new evidence would be heard.

Mr. Christiansen reported that the burden of proof is on the claimant, even though the attorney's office collects the records, and the claimant has the right to supplement the records. He stated the standard of proof for this type of proceeding is based on a preponderance of the evidence, rather than beyond a reasonable doubt as in criminal proceedings. Mr. Christiansen stated his duties are to collect the records of documentary evidence and to advise on any legal issues that may arise in regard to evidence collected and with regard to criteria.

Mr. Christiansen read the provisions of the Plan under Section 10.3-38 is as follows: *Any member who shall become totally or permanently disabled to the extent that he or she is unable by reason of a medically determinable physical or mental impairment to render useful and efficient service as a police officer has a right to a disability pension.* He stated that the definition of totally disabled for the Board's purposes means unable to perform service as a police officer for this department, not whether she can work at any other job. He explained that permanent disability means that the claimant's maximum medical improvement of the condition is not likely to get better to the point that she can be a police officer again.

Mr. Christiansen reported that there are exclusionary factors and the claimant would *not* have a right to a disability pension from the Town's plan if the disability was caused by any of the following disqualifying conditions: a) excessive use or habitual use of any drugs, intoxicants or narcotics, b) injury or disease sustained by willfully and illegally participating in fights, riots or civil insurrections, or while committing a crime, c) injury or disease sustained while serving in any branch of the armed forces, d) injury or disease sustained by the member after his employment as a police officer with the Town of Lady Lake shall have terminated, and e) injury or disease sustained by the member while working for anyone other than the Town and arising out of that employment.

Mr. Christiansen stated that if the Board does find that the claimant is totally and permanently disabled, and no exclusionary factors apply, then the final decision is whether the disability is in line of duty or not in line of duty. He asked if there were any questions.

Chairperson Brough asked for the definition of in the line of duty.

Mr. Christiansen replied that the definition is that the condition was directly caused by the performance of duties of police officer.

Mr. Christiansen stated that the records for this claim have been provided to the members to include the Independent Medical Evaluation (IME), and several supplements have been sent out as well to the trustees and the claimant's attorney. He stated that after these records were sent out, his office became aware of surveillance that was done by the workers' comp carrier. He stated the workers' comp carrier has provided his office with these surveillance disks, and these were sent on to the doctor who completed the IME (Dr. Cox) to review to see if what is on these disks changes his opinion with regard to Ms. Boice's disability claim and her ability to do the job of a police officer; his response has been provided to the Board members and Ms. Boice's attorney. Mr. Christiansen stated that additional information was requested by a Board member that includes salary information, performance evaluations, training records, and an FDLE Firearms Qualification Standard dated April 4, 2014 for Ms. Boice, and that information was also passed on to the Board members and Mr. Kelley.

Mr. Christiansen stated the records show that Ms. Boice claims disability for a right wrist injury suffered in July of 2007 after she slipped and fell while on duty. He gave some background on Ms. Boice's employment of approximately 12 years, and stated she was terminated by the Town for medical reasons on November 14, 2014. He reviewed some of the medical records that showed Ms. Boice had been treated for other issues not related to this claim, particularly with respect to a motor vehicle accident which occurred in July of 2014 for back and neck pain. Records show that the claimant was treated for knee problems and depression; also not related to the disability claim, although wrist issues were noted by the treating physician. He stated that Dr. Steven Pyles, a pain management physician, has also provided a total and permanent disability letter as part of the claimant's application.

Mr. Christiansen turned the floor over to Mr. Kelley.

Attorney Paul Kelley introduced himself as representing Ms. Boice. He stated Ms. Boice's injury occurred on July 9, 2007 while on the job at the police department where she slipped in a puddle of water while going down the stairs and tried to catch herself and caused damage to her right wrist, arm and shoulder. He stated the Town sent Ms. Boice to a workers' comp health center where she has since been referred out for a plethora of treatment, including three surgeries by Dr. Maksoud in 2007, 2008 and 2010; and a subsequent procedure in 2011.

Mr. Kelley pointed out that Ms. Boice went back to work after all of the surgeries and treatment, and it was her intent to continue to work for the Town. He reviewed some of Ms. Boice's previous treatments for depression and injuries relating to the motor vehicle accident, and stated she is out of work today primarily for the issues she has with her right upper extremity. He stated she was also treated for fall injury to her right knee which occurred at a store, and returned to work after surgery and treatment for that in 2005/2006 with no issues. He stated that while she was on her way to a treatment on July 9, 2014, she was rear ended at a stop light, which necessitated treatment for those injuries. Mr. Kelley stated that Ms. Boice's goal was to retire from the Town's police department.

Mr. Kelley stated that although Ms. Boice has been treated for other issues, the injury to her right wrist is the reason for her claim. He reviewed some of the treatment she has undergone for the injury and stated that, unfortunately, Ms. Boice has developed a condition formerly known as reflex sympathetic dystrophy (RSD), now known as complex regional pain syndrome. He explained it is a condition that causes intense pain in specific parts of the body, and can be isolated to one region or spread with no rhyme or reason. Mr. Kelley stated that Dr. Pyles has tried various procedures to alleviate the pain with Dr. Maksoud's knowledge, including a spinal cord stimulator to block some of the nerve pain. He stated she has more recently undergone treatments with Botox and radio frequency ablation.

Mr. Christiansen stated that he did not have any records for the more recent treatment.

Mr. Kelley stated the purpose of his review is to show that Ms. Boice has done everything possible to get better and has completed all recommended treatments.

Member Chiasson asked how a doctor measures pain.

Mr. Kelley stated that doctors cannot measure pain exactly, but they can confirm diagnoses consistent with the pain complaint by completing diagnostic testing such as a thermogram and nerve conduction exam.

Mr. Kelley commented on the surveillance video provided by the workers' comp carrier. He stated Sandy McAuley is present and is the workers' comp attorney who has been working with Ms. Boice, and they have spoken with Dr. Pyles. Mr. Kelley stated that Ms. Boice has been told to try to use her arm as much as possible so that the muscles do not atrophy, and occupational therapy has her work with a hammer to use her wrist. He stated that Dr. Pyles has provided a deposition at the request of the workers' comp attorney and the Town's attorney on whether the claimant's use of her wrist is consistent with the nature and extent of her injury and the course of treatment she has had.

Mr. Christiansen stated that he has nothing in the record on this.

Mr. Kelley agreed that the deposition transcript is not ready yet, but reiterated that there is nothing on the surveillance video or anything provided in the record that is inconsistent with the nature and

extent of the claimant's injury and the course of treatment she has had. He pointed out that Dr. Cox's conclusion is that he agrees Ms. Boice has complex regional pain syndrome, right ulnar impaction and shortening, triangular fibrocartilage and repair, and neurodesis, and agrees that she is at maximum medical improvement. He stated that Dr. Maksoud put her at maximum medical improvement in February of 2011.

Mr. Kelley reported that Dr. Cox has further stated in his June 25, 2015 report that Ms. Boice is totally disabled from doing her full useful and efficient work as a law enforcement official. In Dr. Cox's letter to Mr. Christiansen dated September 16, 2015, he stated that after reviewing a functional capacity evaluation dated Aug. 5, 2014 and 75 minutes of surveillance video which documented Ms. Boice performing light activities with her right hand such as opening and closing a door, holding small objects, and using a hammer to place a sign in the ground, he found the test demonstrated Ms. Boice's ability to do light use of the right upper extremity. Mr. Kelley explained it was a wire type sign that pushes into the ground and Ms. Boice used a smaller hammer to tap it into the ground. His letter further stated that based on the results of the functional capacity evaluation if they were still valid, he thought she could still perform light duty activities with the right upper extremity; however, he did not believe she is able to perform the full duties of a police officer as described in the Town's job description such as handling a firearm.

Mr. Kelley commented on the report of the certifications including the firearm standards of April 14, 2014 where Ms. Boice qualified using her Glock 17.

Member Chiasson asked if the IME doctor had this information.

Mr. Christiansen replied that Dr. Cox did not have the firearms qualification results as it was just requested yesterday.

Mr. Kelley stated that Ms. Boice would not be able to perform the duties of a police officer as a result of her right upper extremity. He stated it is their position that based on the totality of the evidence the Board has in front of them, including the surveillance films and qualification information provided, that Ms. Boice meets the criteria for an in the line of duty disability pension. He stated that she cannot perform the full range of useful and efficient work as a law enforcement officer, although she could do parts of it, and has requested if she could be a desk sergeant, but the Town does not provide that choice. Mr. Kelley stated that Ms. Boice's disability is permanent despite completing every surgery and treatment that was recommended. He noted that the doctors have agreed this was an in the line of duty injury, and workers' compensation has paid for all the treatment. He noted that workers' comp chooses the treating doctors, not Ms. Boice. Mr. Kelley stated that none of the exclusions apply to this injury and that it is their position that Ms. Boice has met every single criteria, based upon the preponderance of evidence, and he respectfully asked the Board to find in favor of an in the line of duty disability pension.

Mr. Christiansen asked if the Board wanted to ask any questions of Mr. Kelley or Ms. Boice.

Member Cieciek asked Ms. Boice about returning to the position of police officer after being a detective in 2005.

Ms. Boice replied that she had to come out of the detective bureau in order to be able to gain a promotion to corporal.

Member Chiasson reported that he created a timeline for a period from 2004 to 2014 from the records and reviewed this to see if he could establish a trend. He noted the number of hours worked

per year ranged from 1920 hours to over 2000, even after the fall, for an average of 1850-1900 hours worked per year. He also reviewed Ms. Boice's performance evaluations over the same period which ranged from above meets standards to outstanding, and she also received promotions during this period. Mr. Chiasson commented that he cannot juxtapose performance and hours worked with the reports from the doctors. He also reviewed the April 14, 2014 FDLE firearms qualification standards report, which showed she shot more than 40 rounds in a timed period such as 12 rounds in 45 seconds, etc., where she received a passing grade. He stated this is not easy to do and demonstrates her ability to handle a firearm in contradiction to the IME doctor's report.

Mr. Kelley responded to Mr. Chiasson's comments by saying he does not belittle firearm use, as he also shoots. He stated the concern is that if Ms. Boice was required to use her right hand vigorously, it would swell and her hand would draw up and cramp.

Member Chiasson asked how often would an officer on the street fire a weapon in the course of a year, other than for training and qualifying.

Chairperson Brough replied that, hopefully, it would never happen.

Mr. Kelley stated it is whether the officer will be required to do it and if so, what happens. He stated as per Dr. Pyles' notes, when Ms. Boice overexerts the use of her hand, it will draw up and cramp up, and it could be a problem if she was put in the position of having to protect herself or someone else as she is right hand dominant. He stated even if Ms. Boice was able to handle the firearm, she would still not be able to physically apprehend or restrain someone as she is at a physical disadvantage with her hand. Mr. Kelley stated again that Ms. Boice wanted to continue on and advance at the department, but the Town did not have work that she could continue to do long-term based on the restrictions her physicians gave her, and that was why she was medically terminated by the Town.

Captain Brough asked Mr. Christiansen to clarify again the in the line of duty definition as to whether it applied to if you were present and being paid.

Mr. Christiansen replied that that it applies to if you are on duty; it does not have to be as a result of a physical altercation, etc. He also clarified that the claimant would be considered totally disabled if she is unable to perform useful and efficient service *as a police officer*. He stated that the Town terminated Ms. Boice's employment for medical reasons on November 14, 2014. Mr. Christiansen stated that there is case law that provides that if the municipality terminates an individual's employment for medical reasons, the Pension Board is estopped or legally prevented from not finding that the individual is totally disabled.

Member Cieciek asked Mr. Christiansen if the Pension Board cannot legally deny the disability pension if the Town terminated the claimant for medical reasons.

Mr. Christiansen replied no, but that if the Town terminates her for medical reasons, the total disability criteria for the Board is deemed to have been established. The question would then be if she is permanently disabled and not likely to ever be able to perform the duties of a police officer, or if any of the exclusionary factors apply.

Member Chiasson asked for further clarification regarding the termination letter by the Town.

Mr. Christiansen replied that the claimant is considered totally disabled due to the Town's termination for medical reasons, and the Board needs to determine if she is permanently disabled, whether any exclusionary factors apply, and if it was in the line of duty or not.

Member Tempesta clarified that these determinations need to be made based on the evidence provided to the Board.

Member Cieciek stated it would be in the line of duty as the claimant was in uniform.

Member Chiasson asked how he should process the doctors' reports as they all say something different from the IME.

Mr. Christiansen replied that the Town did not have the IME at time of termination. He read an excerpt from the letter: *"Unfortunately, your physician has advised that the period of your incapacity is indefinite. It is clear at this point that you are not able to perform the essential job functions of a police sergeant. Since you are unable to return to work, and you have exhausted your available leave time under the FMLA, your employment with the Town will be terminated effective tomorrow, November 14, 2014."* He stated that the Town is saying that they have determined the claimant cannot do her job anymore based on what her doctors have told them.

Member Chiasson asked what would happen if the preponderance of other opinions or evidence shows that is not true and that there is ample evidence that she could be a police officer.

Mr. Christiansen replied that the only thing that could be done then is for the Town to consider bringing her back to duty, and she may not be able to get clearance to return to duty.

Member Cieciek asked which physician the Town is referring to in the termination letter.

Mr. Kelley replied that it would have been either Dr. Pyles or Dr. Maksoud as treating physicians under workers' compensation.

Member Tempesta clarified that the only criteria the Board is looking at is for the injury to the wrist, not any pre-existing conditions.

Mr. Christiansen stated that the wrist is the basis for the claim. He stated a good issue has been raised as the Board does not know the reason for the medical termination by the Town, whether it was for her wrist, back, knee, etc. He stated the case law he mentioned may not apply as the basis for the claimant's termination is unknown.

Member Tempesta commented that the claimant had leave time left when she was terminated.

Further discussion ensued.

Mr. Kelley stated that the period of time for the FMLA had expired and Dr. Pyles had stated in August of 2014 that the claimant would not be able to return to full duty for an indefinite period of time.

Mr. Christiansen pointed out that the motor vehicle accident occurred in July of 2014, the functional capacity evaluation was performed in August of 2014, and the Town terminated the claimant in November 2014. He stated the question remains as to what the basis was for the Town's termination.

Mr. Kelley commented that the Town picked up the motor vehicle accident under workers' compensation as it was related to the treatment for the initial work related accident.

Mr. Christiansen stated that this was not in the record, although the claim is for the wrist.

There was further discussion and review of the records provided.

Mr. Christiansen stated that he cannot tell the Board that they have to find the claimant is totally disabled on the basis of the Town's termination letter as he does not know what the basis of the medical termination is. He suggested identifying additional information to collect and recess to obtain that additional information if the claimant is agreeable.

Member Cieciek volunteered that he will not be available again until October 20th, and that Member Schmied is also out of town until mid-October.

Member Cieciek made a motion to approve the disability claim in the line of duty; Member Tempesta seconded, and the motion failed due to a tie vote of 2-2 (Chiasson/Cieciek). The motion was questioned by the Clerk, and was then withdrawn by Member Cieciek, although Mr. Christiansen stated that this hearing did not follow Robert's Rules of Order.

Member Chiasson made a motion to deny the disability claim; Member Cieciek seconded, and the motion failed due to a tie vote of 2-2 (Brough/Tempesta).

After discussion, and upon a motion by Member Tempesta and a second by Member Cieciek, the Board agreed to recess this hearing until a determination is obtained regarding the Town's termination of the claimant for medical reasons on November 14, 2014, and until all members of the Board could be in attendance, by a vote of 4-0.

Mr. Christiansen asked if Mr. Kelley agreed to the recess and extension of the hearing to obtain additional information.

Mr. Kelley agreed to the extension of behalf of his client.

Mr. Christiansen asked the Board if they also wanted him to send the FDLE Firearm Qualification certification to the IME doctor to see if it changed his opinion.

The Board agreed that the FDLE Firearms Qualification certification should be sent to the IME doctor for review.

5. ADJOURN: With no further business to discuss, the meeting was adjourned at 4:01 p.m.

Kristen Kollgaard, Town Clerk

Chairperson/Captain Jason Brough

Transcribed by Nancy Slaton, Deputy Town Clerk