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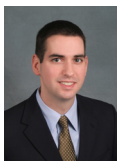
A Monthly Legal Newsletter from

Querrey & Harrow

April 2011

Editors: *Terrence Guolee and Jillian Taylor*



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Seminars

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FOIA Update: Illinois Attorney General Binding Opinion Documents "Clear and Convincing Evidence Standard for Exemption

Matthew J. Byrne - Chicago office

The Public Access Counselor of the Illinois Attorney General's Office recently issued a binding opinion pursuant to Section 9.5(f) of the Illinois Freedom of Information Act (FOIA) that demonstrates the high burden municipal entities have in seeking to withhold documents from production. 5 ILCS 140/9.5

On October 25, 2010, a reporter with the Chicago Tribune submitted a FOIA request to the Chicago Police Department which sought records that contain the current sum of the number of sworn officers assigned to each Chicago Police Department District. The Chicago Police Department's primary argument was that the records constituted "vulnerability assessments, security measures, [or] response policies or plans" that are exempt from disclosure pursuant to Section 7(1)(v) of the Freedom of Information Act. Following review of written responses from the Chicago Police Department and the Chicago Tribune, the Public Access Counselor determined that the Chicago Police Department had not met its burden of proving that the requested records were exempt from disclosure under Section 7(1)(v) of FOIA and ordered that the records be produced.

Section 1.2 of FOIA provides that:

> [a]ll records in the custody or possession of a public body are presumed to be open to inspection and copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2.

Therefore, a public body is required to produce requested records unless they can prove by clear and convincing evidence that the information requested is exempt from disclosures under Section 7 of the FOIA.

In this case, the Chicago Police Department alleged that the requested records were exempt under Section 7(1)(v) of FOIA. Section 7(1)(v) provides that the following records are exempt from inspection and copying:

> Vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public. Information exempt under this item may include such things as details pertaining to the mobilization or deployment of personnel or equipment, to the operation of communication systems or protocols, or to tactical operations.

The Chicago Police Department claimed that this exemption applied to the requested records. In its response to the Public Access Counselor's request for review, the Chicago Police Department asserted "the information that you are requesting pertains to the mobilization and deployment of Chicago Police Department personnel…it can be reasonably expected that the information that you have requested can be used to undermine the effectiveness of the City's security measures or the safety of the personnel who implement them. This would then constitute a clear and present danger to the health and safety of the community."

The Chicago Police Department also submitted an affidavit of the Department's Deputy Superintendent Ernest T. Brown. Deputy Superintendent Brown provided that "although

the number of sworn police officers is a generally static number for each of the 25 districts, the CPD Command Staff makes decisions on deployment of resources, i.e., additional sworn police officers, that may be detailed or assigned to target a certain district and/or beat of a district in response to a large event, a series of violent incidents or other such threat to the public within that area." The Department argued that records relating to details pertaining to the mobilization or deployment of personnel were exempt *per se* under Section 7(1)(v).

The Public Access Counselor reviewed the arguments of the parties as well as the provisions of FOIA and held that Section 7(1)(v) does not generally exempt "details pertaining to the mobilization or deployment of personnel or equipment." Rather, it only exempts such information to the extent that disclosure "would constitute a clear and present danger to the health or safety of the community," and "only to the extent that disclosure would reasonably be expected to jeopardize the effectiveness of the [security] measures or the safety of the personnel who implement them or the public." Therefore, the Public Access Counselor found that records relating to the mobilization or deployment or personnel are not per se exempt.

Based on this, it was found that the Chicago Police Department had not established that the requested records were exempt from disclosure by clear and convincing evidence. The Chicago Police Department was ordered to either comply with the Public Access Counselor's order to produce the records or initiate administrative review under Section 11.5 of FOIA. 5 ILCS 140/11.5.

The Public Access Counselor's opinion was held to be a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 4/3-101, et seq. Judicial review of the decision was available through the filing of a complaint for administrative review in the circuit court within thirty-five (35) days of the date of the decision naming the Attorney General of Illinois and the requesting party as defendants. 5 ILCS 140/11.5.

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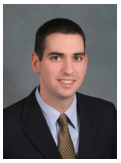
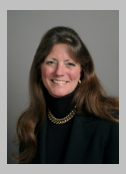


***Matthew Byrne**, an associate in our Chicago office, concentrates his practice in commercial litigation and general defense litigation, as well as municipal and school law. Matt regularly handles FOIA requests and has a thorough knowledge of the provisions and requirements of the Freedom of Information Act, including recent comprehensive changes passed by the Illinois General Assembly. Please contact Matt with any questions regarding FOIA or this article via mbryne@querrey.com, or 312-540-7644.*

Q&H Obtains Summary Judgment in Premises Case



Wheaton office shareholder **Lissa Hamer** and associate **Aaron DeAngelis** obtained summary judgment on behalf a large store chain arguing that the plaintiff had failed to provide any testimony or evidence to impute notice to the defendant of the presence of the foreign substance alleged to have been the cause of the plaintiff's slip and fall. The plaintiff in the action alleged that she slipped on shampoo near the check out aisle resulting in an aggravation of her preexisting low back issues.

Municipal Law Update: Appellate Court Affirms That Section 11-13-25 Of The Illinois Municipal Code Does Not Create An Independent Cause Of Action When Challenging Zoning Amendments.

By: Patrick G. Connelly - Chicago office

As most municipal attorneys and zoning boards are well aware, providing proper notice is an essential step in the undertaking of any zoning changes. Recently the Illinois Appellate Court held that notice requirements are equally essential for those seeking to review a zoning ordinance.

In *Figel v. The Chicago Plan Commission*, No. 1-09-2584 (March 4, 2011), the 1st District, Fifth Division, Appellate Court upheld the circuit court's granting of the Defendant's Motion to Dismiss pursuant to Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)). Plaintiffs were all owners of property adjacent to the area of Grant Park where the construction of a children's museum and field house was being contemplated. From April through July of 2008, The City of Chicago, its department of planning and zoning, and the City Council Committee on Zoning reviewed and analyzed petitions requesting amendments to the Lake Michigan and Chicago Lakefront Protection Ordinance (see Chicago Municipal Code Section 16-4-100) and the Institutional/Transportation Development No. 677. The amendments were requested by the Chicago Park District and Chicago Children's Museum. After numerous public hearings and positive recommendations, the City enacted an ordinance granting the zoning amendments sought and effectively green-lighting the project.

The Plaintiffs' original Complaint sought *de novo* review of the amending ordinance pursuant to section 11-13-25 of the Illinois Municipal Code (65 ILCS 5/11-13-25 (West 2008)). Plaintiffs alleged that they were unconstitutionally deprived of their due process rights at each stage of the decision-making process and asked the circuit court "to enter judgment declaring" the zoning amendment unconstitutional.

Hamer Obtains Not Guilty For Driver in Pedestrian Claim

Lissa Hamer obtained a Not Guilty verdict following a three day trial in DuPage County. The plaintiff was a pedestrian crossing through the lanes of traffic on York Road near its intersection with Grand Avenue in Bensenville, IL. As he entered the left turn lane, he was struck by the SUV being operated by the defendant, Lissa's client. It was the plaintiff's contention that he was crossing through stopped vehicles and that the defendant had swung around the line of traffic to get into the left turn lane to catch the turn arrow. A companion of the plaintiff who witnessed the accident confirmed the plaintiff's version and went on to testify that he observed the defendant talking on her cell phone right before the contact occurred.

The defense contended that the defendant waited until the light turned to green and traffic began to move forward allowing her to move into the turn lane. Just as she was fully within the lane, she heard the screech of tires to her right, turned and saw the plaintiff running through traffic and directly in front of her car. As such, it was the contention of the defense that the plaintiff was more than 51% contributorily negligent.

The plaintiff sustained a complex fracture of the femur which required open reduction and fixation with intermedullary rodding. Medical expenses were over $60,000.00 and plaintiff suggested a value of $400,000.00 for compensation. The verdict was returned in favor of the defendant in less than 30 minutes.

In response, Defendants filed a motion to dismiss pursuant to Section 2-619 because Plaintiffs failed to comply with the notice requirements of section 11-13-8 of the Illinois Municipal Code (65 ILCS 5/11-13-8 (West 2008)) prior to filing their Complaint. Section 11-13-8 of the Illinois Municipal Code requires any plaintiff seeking to invalidate a zoning ordinance by means of a declaratory judgment action must provide written notice of the lawsuit to all property owners within 250 feet of the affected property not more than 30 days before filing suit. It was undisputed that Plaintiffs never provided such notice.

Before a ruling was made on the Defendants' initial motion to dismiss, the Plaintiffs amended their complaint in an attempt to "back-door" the notice requirements. Essentially, they took the word "declare" out of their prayer for relief and instead asked the court to "find" that the zoning amendment was unconstitutional. Defendants responded by filing another motion to dismiss arguing that although Plaintiffs removed the term "declare" from their Amended Complaint, they were essentially seeking the same thing—a declaratory judgment. Accordingly, the Defendants argued that Plaintiff failure to comply with section 11-13-8 of the Illinois Municipal Code was fatal. The circuit court agreed and granted Plaintiff's Motion to Dismiss based on Plaintiffs' failure to provide notice of the suit to the adjacent property owners.

On appeal Plaintiff's argued that their failure to provide notice pursuant to Section 11-13-8 was not fatal as their Amended Complaint was not a declaratory action but rather an independent cause of action brought pursuant to section 11-13-25 of the Municipal Code. That section is entitled "Actions subject to de novo review; due process," and reads in relevant part:

> (a) Any decision by the corporate authorities of any municipality, home rule or non-home rule, in regard to any petition or application for a special use, variance, rezoning, or other amendment to a zoning ordinance shall be subject to a de novo judicial review as a legislative decision, regardless of whether the process is in relation thereto is considered administrative for other purposes. Any action seeking the judicial review of such a decision shall be commenced not later than 90 days after the date of the decision." (65 ILCS 5/11-13-8)

Plaintiff argued that this section created an entirely separate cause of action for challenging zoning decisions; one which did not require the same notice when seeking a declaratory judgment pursuant to Section 11-13-8.

Q&H Obtains Dismissal of Dram Shop Claim

Lissa Hamer and **Aaron DeAngelis** obtained a dismissal with prejudice on a Dram Shop claim alleging plaintiff's failure to plead the action within the statutory one year limitations period. The plaintiffs filed their complaint for personal injuries arising out of an automobile collision with an intoxicated driver. A Dram Shop count was timely filed in the original complaint directed against a country club which was located near the site of the collision and believed to be the location at which the driver had consumed alcohol. This entity was then voluntarily dismissed and five months later the count against Lissa's client was filed as part of the plaintiff's Second Amended Complaint. Plaintiff's counsel argued that the filing of the new count should be allowed to "relate back" to the original dram count which had been dismissed.

It was the contention of the defense that there could be no relation back as the original dram defendant had ceased to exist with the dismissal. The work done by Aaron DeAngelis was instrumental as the court found the case law cited by the defense to be persuasive and dismissed the Dram Shop count with prejudice.

In rejecting this argument, Judge Fitzgerald Smith cited to a recent First District Appellate Opinion considering the exact same issue—whether Section 11-13-25 created an independent cause of action for challenging zoning decisions.

In *Dunlap v. Village of Schaumburg*, 394 Ill.App.3d 629, 639 (2009), the First District specifically rejected the argument that Section 11-13-25 created an independent cause of action. Instead, the Dunlap court noted that Section 11-13-25 was amended by the General Assembly in 2006 in order to "[do] away with any distinction in the standard of review between variances and other forms of zoning ordinance amendments." Id at 641. Thus, pursuant to *Dunlap,* Judge Fitzgerald Smith found that the sole purpose of Section 11-13-25 is to create one standard of review (de novo) for challenges to all the different forms of zoning amendments i.e., variances, special uses, and rezoning requests.

Since Section 11-13-25 does not create an independent cause of action, the *Figel* court upheld the granting of the motion dismiss for failing to comply with the notice requirements of Section 11-13-8. Plaintiffs attempt to disguise the form of their Complaint by removing the term "declare" did not change the fact that they sought an order from the Court declaring the children's museum ordinance unconstitutional. The *Figel* decision is important both for zoning bodies defending against attacks on their ordinances and for those seeking to challenge zoning ordinances. For zoning bodies, it is good practice to ensure that any person seeking a declaratory judgment as to a zoning ordinance did in fact perfect service on all property owners within 250 feet of the affected property. A failure to do so will result in a dismissal with prejudice. On the other hand, persons seeking to challenge a zoning ordinance must understand what relief they are requesting. If they are seeking a declaration that an ordinance is unconstitutional, any failure to strictly follow the notice guidelines of Section 11-13-8 will prove fatal.

Querrey & Harrow represents several different municipalities, governmental entities and others in zoning matters.

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***Patrick Connelly**, an associate in our Chicago office, concentrates his practice in municipal defense and general litigation. He has successfully defended a number of §1983 lawsuits for municipalities throughout Illinois.*

Please contact Pat with any questions via pconnelly@querrey.com, or 312-540-7556.

Querrey & Harrow's Sixth Annual Candy Days for Misericordia Set

Querrey & Harrow, Ltd. is thrilled to support Misericordia Heart of Mercy's Candy Days on Friday, April 29th! Over the past five years, our volunteers have raised **$37,084.49** for the over 500 children and adults who call Misericordia home! This year is no different! **Friday, April 29, 2011** from dawn until dusk we'll be back on the street fundraising.

Misericordia is a residential facility serving 550 children and adults with developmental and physical disabilities from all ethnic, religious, racial, and socio-economic backgrounds. A not-for-profit 501(c)(3) organization, Misericordia is operated by the Sisters of Mercy under the auspices of the Catholic Archdiocese of Chicago. Misericordia is located at 6300 N. Ridge Road, Chicago, Illinois 60660. Please visit www.misericordia.org for more information.

This year, the need is even greater. Misericordia hopes to raise $1.2 million dollars during its fundraiser April 29-30th. Look for Q&H attorneys and staff out in the south Loop on April 29. Better yet, if you'd like to join us and "shake your can" for Misericordia, contact Eileen Sethna at esethna@querrey.com.

School Law Update: Seventh Circuit Decision Finds Due Process Property Right to Recall Procedures Held By Tenured Teachers

By: Terrence Guolee - Chicago office

The Seventh Circuit Court of Appeals in *Chicago Teachers Union et al. v. Board of Ed. of the City of Chicago et al.,* No. 10-3396 (March 29, 2011), recently released a decision finding tenured, but laid-off teachers under Illinois law enjoy due process rights to be considered for reinstatement when the Board of Education begins rehiring following budgetary layoffs. The decision is important to all school districts in Illinois and, likely, to any other employers whose employees are vested with statutory tenure and, possibly, have contractual or other claims to protected employment to consider when layoffs are followed by rehiring.

Facing significant budget deficits, the Chicago Board of Education was forced to lay off nearly 1,300 teachers in several stages during June, July, and August of 2010. Following these layoffs, certain of the teachers were re-hired, but many were not brought back even as new vacancies arose within the Chicago Public School system.

The teachers not recalled to employment brought suit, contending that they had a due process right under the Fourteenth Amendment to an opportunity to show that they are qualified to fill new vacancies as they arose for a reasonable period of time. The district court agreed and entered an injunction requiring the Board to collaborate with the Union to promulgate regulations to establish recall procedures pursuant to Section 34-18(31) of the Illinois School Code.

On appeal, the Seventh Circuit agreed with the injunction requiring the Board to promulgate the regulations for recall procedures, while noting that the code section involved did not require "cooperation" with the Union. The court thus ordered the entry of a modified injunction order.

As background, the Board of Education of the City of Chicago (the "Board") is organized under Article 34 of the Illinois School Code and is charged with the governance of the Chicago Public School system. The Board employs over 40,000 persons, over half of whom are teachers. The Chicago Teachers' Union (the "Union") is the teachers' exclusive bargaining representative. As to the laid-off teachers, although the Board suggested to the media that the layoff largely involved teachers with unsatisfactory evaluations, most of the teachers had "excellent," "superior," or "satisfactory" ratings.

All the laid-off teachers received notice of their termination. Along with their notices, the Board gave the teachers information on how to search and apply for vacant teaching positions within the Chicago Public School system. The notices also pointed the teachers to a website listing vacancies and included invitations to attend a résumé and interviewing workshop and two job fairs that were open solely to displaced teachers. However, not all vacancies were listed on the website, and laid-off teachers were not given preference for other teaching jobs. Throughout the summer, the Board laid off over 1,200 teachers in several phases. At the same time, however, certain non-tenured teachers were hired to fill teaching positions that became available during the summer.

Following an increase in federal funding in August 2010, the Board recalled approximately 715 tenured teachers who had been laid off or given notices. Also, since the layoff, more vacancies opened up within the Chicago Public School system and natural labor needs compel the Board to hire hundreds of new teachers every year. That said, the laid-off teachers who were not rehired complained that many of those positions have been filled with new hires instead of with laid-off tenured teachers.

The Union then filed a complaint and sought a preliminary injunction. On September 15, 2010, the district court held a hearing to simultaneously address the Union's motion for a

preliminary injunction and its request for a permanent injunction. The court found that the teachers had a property interest proceeding from 105 ILCS 5/34-18(31) that was protected by the Fourteenth Amendment to the United States Constitution and that entitled them to some kind of retention procedure. The court then found that, in addition to succeeding on the merits, the Union met the requirements for obtaining a permanent injunction. The court therefore entered an injunction: (1) directing the Board to rescind the discharges of tenured teachers; (2) directing the Board to promulgate, in consultation with the Union and after good faith negotiations, a set of recall rules compliant with 105 ILCS 5/34-18(31) within 30 days; and (3) enjoining the Board from conducting future layoffs in a similar manner until recall rules had been promulgated.

The Board appealed and filed a motion to stay the permanent injunction pending the outcome of the appeal, which the district court granted.

In reviewing the Union's Due Process claim, the Seventh Circuit noted, *inter alia*, that "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972). To prevail on a claim for deprivation of property without due process, a plaintiff must establish that she holds a protected property interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546-47 (1985). And, an individual has a property interest in a benefit if they have more than an "abstract need" for, or "unilateral expectation" of, that benefit. *Roth*, 408 U.S. at 577.

With this in mind, the court noted that, in Illinois, tenured teachers cannot be discharged except for cause pursuant to Section 34-85 of the School Code. Section 34-85 provides:

> No teacher employed by the board of education shall after serving the probationary period specified in section 34-84 be removed except for cause. (emphasis added). 105 ILCS 5/35-85.

Thus, the court held that tenured teachers in Illinois have a property interest in their continued employment. Citing *Loudermill*, 470 U.S. at 535-39 (state statute providing that classified civil service employees were entitled to retain their positions during good behavior and prohibiting dismissal except for bad behavior created a property interest in continued employment); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (written contract with an explicit tenure provision evidenced a formal understanding that supported a teacher's claim of entitlement to continued employment); and *Bigby v. Chicago*, 766 F.2d 1053, 1056 (7th Cir. 1985).

The court then noted that they had not previously considered whether tenured teachers are entitled to consideration for reassignment. Per the court, to determine whether the teachers have a property interest that entitles them to an opportunity to be considered for new vacancies, they needed to look to Illinois law. In this respect, in 1995, the Illinois School Code underwent a significant revision and 105 ILCS 5/34-18(31) was added. Section 5/34-18(31) provides in relevant part that:

> The board . . . shall have power . . . to promulgate rules establishing procedures governing the layoff or reduction in force of employees and the recall of such employees, including, but not limited to, criteria for such layoffs, reductions in force or recall rights of such employees and the weight to be given to any particular criterion.
>
> Such criteria shall take into account factors including, but not limited to, qualifications, certifications, experience, performance ratings or evaluations, and any other factors relating to an employee's job performance.

Reviewing this, the court found that, while "not crystal clear," the Code contemplates that the Board will promulgate rules "governing the layoff . . . and the recall of such employees," not

layoffs alone. (emphasis added); citing, *Powell v. Jones*, 305 N.E.2d 166, 171 (Ill. 1973) (explaining that a layoff is "not, ordinarily, viewed as a permanent situation").
Thus, the court found the statute further limits the Board's discretion by requiring it to take various criteria (qualifications, certifications, experience, performance ratings, and evaluations) into account. Likewise, the cases that have examined the relationship between Sections 34-84, 34-85, and 34-18(31) "do not suggest that tenured teachers do not have a right to be considered for vacancies, but, rather, that it is now the Board's responsibility, instead of the legislature's, to formulate procedures governing layoff and recall."

Following a review of certain Illinois court cases, the Seventh Circuit found that neither the 1995 amendments, nor the Illinois cases construing them, suggest that tenured teachers are not entitled to an opportunity to show that they are qualified for vacancies after an economic layoff. Rather, the tenure rules provide the teachers a:

> property interest in their continued employment and entitled them to an opportunity to demonstrate that they were capable of performing temporary work, give rise to a legitimate expectation that tenured teachers who are laid off will be given the opportunity to show that they are qualified for new vacancies for a reasonable period of time.

In this respect, the court stated:

> if a 'permanent' appointment means anything, it at least means that if vacancies arise during or shortly after a layoff, the teachers who originally held 'permanent' appointments should be given a meaningful opportunity to show that they remain qualified to fill those positions.

Having held that the teachers have a cognizable property interest, the court then turned to the issue of what process is due to them. Whether an employee has received all the process that would have been due in connection with his or her termination is a question of federal law. Here, the teachers contended that they are entitled to "preference for vacancies." The court disagreed with this, finding only that the availability of a post-termination procedure by which the teachers can show that they are qualified for vacancies is all that is necessary to satisfy due process, stating that "[t]here is no guarantee of a particular substantive outcome."

From this, the court found that the teachers were only entitled to a recall procedure and that they should be given a meaningful opportunity to show that they are qualified for new vacancies for a reasonable period of time. Indeed, evidence that the laid-off teachers could have attended job fairs and a resume workshop were found to be insufficient and not the required procedure satisfying their property interest in being considered for recall.

Of note, the court found that if a proper procedure was enacted and followed, it would be acceptable even if every laid-off teacher is not rehired. In this respect, the Seventh Circuit agreed with the district court that it should defer to the "institutional competence" of the Board "to define the exact contours of [the] procedures" to be enacted in light of Section 34-18(31).

Finding that there is a requirement of the Board to implement a recall procedure, the Seventh Circuit went on to consider whether the Board was required to "cooperate" with the Union in designing the procedure. On this, the Seventh Circuit found no such requirement in the School Code and limited the injunction accordingly. It noted, however, that "consultation with the Union may expedite the process of promulgating the rules, there is nothing in Section 34-18(31) that requires cooperation with the Union, and we decline to impose such a requirement."

Interestingly, Justice Manion, dissenting in part and concurring in part with the court, noted that the court's decision takes a "vague enabling statute giving the Board the power to make recall procedures and turns it into an affirmative

right for Union members to have recall procedures." Justice Manion thus disagreed with the majority to the extent its decision gave the Union members the right to these procedures, and elevates these procedures to the place of property rights, covering them with the guarantees of the Due Process Clause.

In particular, Justice Manion noted that the Union never negotiated with the Board to secure recall rights in the case of an economic layoff, noting "it was not an oversight, since it did negotiate for and secure recall rights in the case of non-economic layoffs." Based on this, Justice Manion asserted that the property rights were too speculative to support protection under the Due Process Clause of the Fourteenth Amendment.

Justice Manion was also critical of the court vesting tenure rights under protection of federal constitutional law, when tenure is a creation of state law. Citing *Gonzales*, 545 U.S. at 758; and *Goros v. County of Cook*, 489 F.3d 857, 860 (7th Cir. 2007) ("State law defines property; federal law defines the process that is due." (quotation omitted)).

Finally, Justice Manion disagreed with the court's decision's effect of transforming the Union members' tenure expectations into substantive property rights. Where the Union was litigating to ensure the laid-off teachers "had a foot in the door" for recall, the decision went further in finding that Union members have a right to recall procedures that, while the Board is empowered to create under Section 5/34-18(31), have not been created. As such, there is now a property right to a procedure that does not, as yet, exist.

In summary, Justice Manion noted that:

> the Union failed to bargain over and secure recall procedures for its members when there is an economic layoff. Faced with this reality after the layoff, it has tried to create a property right out of the statute that empowers the Board to make such procedures. The district court and this court have acquiesced, finding that the Due Process Clause protects what amounts to a vague and amorphous expectation of recall procedures, but the Due Process Clause protects neither vague expectations nor procedures. The substance and form of recall procedures during an economic layoff should be resolved at the bargaining table; it is not for us, fifteen years after the statute was passed, to remedy that by calling the expectation of "recall procedures" property rights and placing them under the protection of the Due Process…

In the end, Justice Manion's concerns are not the law as found by the Seventh Circuit. Thus, school districts and other employers of statutorily tenured employees will need to consider recall procedures in the event layoffs impact tenured employees. Failure implies potentially very expensive civil rights claims.

* * *

***Terrence Guolee**, a shareholder in our Chicago office and editor of this newsletter, has successfully represented defendants, plaintiffs and carriers in dozens of complex, multimillion dollar claims covering a wide area of facts and law, in both state and federal court. Terrence represents several municipalities, elected governmental officials and their employees in very complicated civil rights class actions and claims brought under state and federal whistleblower laws. Please direct any questions regarding this article to Terrence at 312-540-7544 or tguolee@querrey.com.*

Successful School Board Candidates Embrace The Duties of Their Elected Posts

Querrey & Harrow is proud to announce three successful school board campaigns resulting from the April 5, 2011 elections. Jim Bream, Terry Guolee, and Scott Rochelle have worked tirelessly in their campaigns and now embrace the challenges bestowed upon them by their communities.

James M. Bream – Northbrook/Glenview School District 30 – President (4th term)

I am very pleased to have received the support of the community in my reelection to the Northbrook/Glenview School District 30 Board of Education. These are very important times for education in our State and I am honored to be able to serve the citizens and students of the District in our continued pursuit of excellence in a fiscally appropriate manner. I am also pleased to be part of a firm where public service, and in particular service to the education of our children, is shared by my colleagues. Congratulations to Scott and Terry for their successful campaigns and for their dedication to public service in the name of education. Perhaps that is why at Querrey & Harrow we are known to be "Result Oriented. Success Driven."

Terrence F. Guolee – Skokie School District 73.5 – Board Member

I am very grateful and excited for the opportunity to serve my family's local school district, Skokie District 73.5, for the next four years. I am also thankful to work at a law firm that prides itself and supports public service by its attorneys and staff. Congratulations go to Jim and Scott as well, as they continue Querrey & Harrow's 70 years of service to the public.

R. Scott Rochelle – Evanston Township High School District 202 – Board Member

I am overwhelmed by support of the Evanston/Skokie community and wholeheartedly welcome the opportunity to serve as a member of the Evanston School District 202 Board of Education. As a graduate of Evanston Township High School and the beneficiary of its rich academic traditions and diverse culture, I wholeheartedly accept the challenge of working collaboratively with all community stakeholders in ensuring that we are giving all students of Evanston Township High School the very best education available. I credit the very community members who have shaped my growth to date for guiding me to serve in this position and I am thankful to have the support from my professional colleagues who encouraged me to follow my heart and pursue public service. It pleases me to join shareholders Terry Guolee and Jim Bream as members of Querrey & Harrow who are committed to working for our respective school communities. I trust that their leadership will help me to be the best board member that I can be.

Querrey & Harrow attorneys and staff support their efforts to provide quality education in a conducive environment and to helping the next generation succeed, both personally and professionally.

Settlement Agreements: Don't Agree to What You Don't Understand

Jillian Taylor – Chicago office

On March 22, 2011, the 1st District Appellate Court upheld a Cook County court's ruling regarding the enforcement of a settlement agreement. In *Dallas v. Chicago Teachers Union, et al*, No. 1-10-0979 (1st Dist. Mar. 22, 2011), a settlement agreement was reached prior to trial which included a confidentiality provision. Plaintiff alleged that, subsequent to the agreement, defendants violated the provision and were subject to damages for same. The circuit court ruled that the provision had in fact been breached and awarded the plaintiff $100,000. The appellate court affirmed.

Theodore Dallas was re-elected as Vice-President of the Chicago Teachers Union (CTU) in 2007. However, by 2008, he was being accused of misusing union funds and other "inappropriate activities". Dallas claimed that the allegations were all fabricated to force him from office. President Stewart convened her executive committee for a hearing on the allegations, instead of submitting the matter to the House of Delegates or the general union membership. The executive committee found Dallas "guilty", stripped him of his union membership and removed him from his position as Vice-President of the CTU. Dallas filed suit against the CTU, its President, Marilyn Stewart, and two other members, alleging conspiracy to damage his reputation and remove him from office.

Before reaching trial, the parties participated in settlement negotiations and reached a successful settlement. All parties entered into a settlement agreement, which included a confidentiality provision, paragraph 2.1, which read (in relevant part):

> The CTU, including through its elected officers, employees and agents acting on its behalf, will not make any written or oral statement concerning [plaintiff] or the settlement… [and will] not issue any written statement disparaging any of the Defendants and/or [plaintiff]. Likewise, the parties agree that violation of this provision would cause substantial damage…for which either would be entitled to damages… The parties mutually agree that such damage would be a minimum of One Hundred Thousand Dollars ($100,000.00)…

In October 2009, the CTU sent an article to its membership addressing issues up for vote in a referendum. In doing so, they referenced the "lengthy legal action as was the case last year when the former vice president was removed from office." Also in October 2009, a CTU article referenced "the removal from office of the former vice president for inappropriate activities". Even further, in November 2009, a CTU article stated:

> As most members will recall, the former Vice President was removed from membership in the Union in the fall of 2008 because of a number of charges brought against him, including misuse of Union funds, providing special benefits to some members over others, and inappropriate behavior toward colleagues.

Dallas filed a motion with the court to enforce the settlement agreement, citing the confidentiality provision as having been violated. The circuit court found that the defendants had violated the provision by the published statements and that Dallas was entitled to damages under paragraph 2.1 in the amount of $100,000.

Defendants argument was that the provision of paragraph 2.1 was unenforceable because it bore no reasonable relationship to the actual damages that Dallas might have sustained. Specifically, because paragraph 2.1 does not "account for the

content and veracity of the publications". This indicates that the provision allows for a penalty of unreasonable amounts and is triggered by any statement whatsoever. The "minimum" of $100,000 is further evidence that no attempts are made to calculate realistic damages.

The appellate court disagreed with the defendants' argument, citing that the parties agreed on the minimum of $100,000 as a damages figure. It was therefore reasonable at the time of contracting. In further holding, the court clarified that the confidentiality provision was not just applicable to disparaging remarks about the plaintiff. The language of the agreement clearly stated that it pertained to "any written or oral statement concerning [plaintiff] or the settlement". The appellate court held that the circuit court correctly interpreted the provision and awarded damages.

This case highlights the importance of agreements entered into by parties at any stage of litigation, or even outside of litigation. This confidentiality provision was agreed to by all parties. Clients often enter into agreements such as these assuming that it will be the other party who breaches the contract and is subject to paying the damages which result. All too often they overlook the possibility that they may be the ones subject to paying damages for their own breach. This case is an example of the utmost importance of clarification of all terms of settlement (or other) agreements. When parties "agree", it is assumed that they understand the terms that they are agreeing to and signing off on. The extra time spent on understanding all terms and their consequences is well worth the time, which could otherwise end up in further litigation.

* * *

***Jillian Taylor**, an associate in our Chicago office, concentrates her practice in nursing home litigation. Prior to joining the practice group, Jill tried more than 10 cases to jury verdict and has participated in over 30 arbitrations in auto and premises liability. In addition, she has drafted and been successful in multiple motions for summary judgment for the firm's major clients. If you have questions regarding this article, please contact Jill via jtaylor@querrey.com.*

Q&H's Jim Bream Invites You to Character Counts! Event
Attea Middle School – Glenview, Illinois
April 28, 2011

CHARACTER COUNTS! in Glenview is hosting a panel discussion related to athletics and ethics. Panelists include Bob Berland (Olympian), Pat Fitzgerald (Northwestern Football Coach), Brian Hansen (Olympian), Denis Savard (NHL Hall of Famer), A.J. Schurr (high school student at Libertyville High School), Jim Schwantz (former NFL player) and Paul Stevens (Northwestern Baseball Coach).

The event is free and open to the public and will be held on April 28 from 7-9 p.m. at Attea Middle School. If you are interested in speaking with someone about this event, please contact Hoffman Principal Mark Walther (who is co-chair of CHARACTER COUNTS In Glenview!) at 847-998-5040 or Jim Bream at 312-540-7520 (the other co-chair).

Q&H Shareholder Jim Bream is Co-Chairman of CHARACTER COUNTS!

SEMINARS

Small Business Legislative Update
Chicagoland Chamber of Commerce, 200 E. Randolph, Ste. 2200, Chicago, Illinois
April 20, 2011, 11-12:00 p.m.

Join Querrey & Harrow Shareholder **Dominick Lanzito** and Of Counsels, **Illinois Representative Lou Lang** and **Representative Michael Connelly** on April 20, 2011 for a moderated Small Business Legislative Update and find out what you need to know about changes that will affect small businesses in Chicagoland. This educational event will bring you up to date with current legislation, how it affects your company and employees, and what changes you can except to prepare for in the near future. The panel discussion will begin at 11:00AM followed by Q & A at Noon.

Featured in the discussion will be:

Representative Lou Lang (D) - 16th District
- Deputy Majority Leader and the Democratic Floor Leader.
  Chairman of the Gaming Committee and on the Insurance Committee

Representative Michael G. Connelly (R) - 48th District
- Currently serves on the Small Business Empowerment and Workforce Development Committee, Public Utilities Committees, Business Occupational Licenses Committee, and the Financial Institution Committee.

For more information about the event or the committee please reach out to Dominick Lanzito at dlanzito@querrey.com, or contact the Chicagoland Chamber of Commerce directly via Damian Silver (312-494-6774 or dsilver@chicagolandchamber.org) or Laura Meyer (312-494-6703 or lmeyer@chicagolandchamber.org).