A G E N D A

REGULAR MEETING OF THE BOARD OF POLICE COMMISSIONERS OF THE VILLAGE OF WILLOWBROOK TO BE HELD ON FRIDAY, JUNE 17, 2016, AT 7:00 A.M. AT THE VILLAGE HALL, 835 MIDWAY DRIVE, IN THE VILLAGE OF WILLOWBROOK, DUPAGE COUNTY, ILLINOIS

1. CALL TO ORDER

2. ROLL CALL

3. VISITORS' BUSINESS - Public comment is limited to three minutes per person

4. OMNIBUS VOTE AGENDA:

   a. Review and Approve Minutes – Regular BOPC Meeting - May 20, 2016 (APPROVE)
   b. Review and Approve Minutes – Closed Session BOPC Meeting - May 20, 2016 (APPROVE)

5. COMMUNICATIONS

6. UNFINISHED BUSINESS

   a. Discussion/Update – Testing Process

7. NEW BUSINESS

   a. MOTION – Amendment to Rules and Regulations - Promotional Exams
   b. MOTION – Temporary Waiver of Higher Education Requirements

8. CLOSED SESSION

9. ADJOURNMENT

MINUTES OF THE REGULAR MEETING OF THE BOARD OF POLICE COMMISSIONERS HELD ON MAY 20, 2016 AT THE VILLAGE HALL, 835 MIDWAY DRIVE, WILLOWBROOK, DUPAGE COUNTY, ILLINOIS

1. CALL TO ORDER

The meeting was called to order by Chairman Schuler at the hour of 7:00 a.m.

2. ROLL CALL

Those present at roll call were Chairman William Schuler, Secretary Stephen Landsman, and Commissioner Joseph Heery. Also present were Village Administrator Timothy Halik, Chief of Police Mark Shelton, and Executive Secretary Cindy Stuchl.

ABSENT: None

A QUORUM WAS DECLARED

3. VISITORS' BUSINESS

None presented.

4. REVIEW AND APPROVE MINUTES - SPECIAL BOPC MEETING - APRIL 7, 2016

The Commission reviewed the April 7, 2016 minutes. Commissioner Heery related there was an error in his title.

MOTION: Made by Commissioner Heery, seconded by Secretary Landsman, to approve the April 7, 2016 as amended.

UNANIMOUS VOICE VOTE MOTION DECLARED CARRIED

5. COMMUNICATIONS

None presented.

6. UNFINISHED BUSINESS

a. Discussion - Application/Testing Process.

Chairman Schuler reported that the Sergeants List will expire on November 8, 2016. Chief Shelton stated he will contact Selection Works to begin the testing process in August. This will allow the officers who are eligible and choose to participate

sufficient time to review the required materials. Written tests will be scheduled for September and oral interviews will be scheduled for October. Commissioner Heery commented that having two (2) outside personnel to assist with the oral interviews was very useful.

Chairman Schuler reported that the Patrol Officer Eligibility List will expire on March 20, 2017. Chairman Schuler stated that the BOPC needs to determine how many applicants the Commission will invite to participate in the oral interview portion of the testing process. After discussion, the consensus was to conduct oral interviews with the top 25 applicants after the written exam. Time table was proposed to post an application notice in November, conduct written exams in January, and oral interviews in February.

Chairman Schuler asked Chief Shelton also to request the testing agency to provide procedures that the Commissioners will use for the new applicant oral interview process.

7. NEW BUSINESS

a. Discussion and Approval - Hiring of New Patrol Officer

Chief Shelton reported the need to hire two new patrol officers: one due to a retirement, the other because a recently hired officer resigned to accept a similar position at another department.

The Commission recessed into Closed Session to discuss the potential new hires.

8. CLOSED SESSION

RECESS INTO EXECUTIVE SESSION

MOTION: Made by Commissioner Heery and seconded by Secretary Landsman to recess into Closed Session at the hour of 7:14 a.m.

ROLL CALL VOTE: AYES: Chairman Schuler, Secretary Landsman, and Commissioner Heery. NAYS: None. ABSENT: None.

MOTION DECLARED CARRIED

The Commission reconvened the Regular Meeting at the hour of 7:30 a.m.

Those present at roll call after reconvening were Chairman William Schuler, Secretary Stephen Landsman, and Commissioner Joseph Heery.
ABSENT: None

Also present were Village Administrator Timothy Halik, Chief of Police Mark Shelton, and Executive Secretary Cindy Stuchl.

MOTION TO APPROVE – APPOINTMENT OF NEW HIRES

MOTION: Made by Commissioner Heery and seconded by Secretary Landsman to approve and accept the application of the new hire, Matthew Vanderjack, as presented.

ROLL CALL VOTE: AYES: Chairman Schuler, Secretary Landsman, and Commissioner Heery. NAYS: None. ABSENT: None.

MOTION DECLARED CARRIED

MOTION: Made by Secretary Landsman and seconded by Commissioner Heery to approve and accept the application of the new hire, Joseph LaValle, as presented.

ROLL CALL VOTE: AYES: Chairman Schuler, Secretary Landsman, and Commissioner Heery. NAYS: None. ABSENT: None.

MOTION DECLARED CARRIED

Discussion began on the age and experience review that Chairman Schuler has requested. Chief Shelton advised that Deputy Chief Schaller completed the review. Chief Shelton stated that potentially within the next four years, there will be a turnover of the numbers of younger vs. older officers due to retirements.

9. ADJOURNMENT

MOTION: Made by Secretary Landsman, seconded by Commissioner Heery, to adjourn the meeting at the hour of 7:55 a.m.

UNANIMOUS VOICE VOTE MOTION DECLARED CARRIED

PRESENTED, READ and APPROVED,

June 17 , 20 16

_____
Chairman

Minutes transcribed by Executive Secretary Cindy Stuchl.

BOARD OF POLICE COMMISSIONERS MEETING

AGENDA ITEM SUMMARY SHEET

AGENDA ITEM DESCRIPTION

MOTION – Amend BOPC Rules & Regulations Promotional Testing

Meeting Date: June 17, 2016

BACKGROUND

While Chief Shelton was working on arrangements with Selection Works for the upcoming promotional list testing process, he noted that some language that had appeared in the prior BOPC Rules and Regs was no longer there. The prior version of the Rules & Regs contained language that stated if an officer was still on their 18-month probation, or did not have a Bachelor's Degree from an Accredited College or University, they were not eligible to test for the promotional list. The current language does not mention the college degree requirement. Staff contacted Attorney Broihier, he reviewed the prior documents, and responded that it was an inadvertent omission in the newly adopted version. He has proposed amendatory language (see attached) that would need to be adopted by the BOPC through a motion to remedy this oversight. Attorney Broihier is not charging us for his work on this "fix" because he had missed it in his prior review of the final document.

REQUEST FOR FEEDBACK (if any)

Should the Rules & Regs be amended to require the qualifications as in the previous BOPC Rules & Regs, dated August 16, 2013, or leave as is and omit the Bachelor's requirement.

STAFF RECOMMENDATION

Approve amendment.

MOTION

IT IS HEREBY moved that the Board of Fire and Police Commissioners of the Village of Willowbrook, Illinois, amend its current rules and regulations by inserting into Chapter VI, SECTION 4 entitled "General", after the 3rd sentence therein, the following:

> "All candidates for promotion shall have obtained, at such time as the Notice of Promotional Testing is posted, a Bachelor's Degree from an Accredited College or University."

Dated: _____, 2016.

Motion made by: _____

Seconded by: _____

Vote: Aye _____ Nay _____

_____
Chairman

_____
Secretary

_____
Commissioner

PUBLIC NOTICE

Public Notice is hereby given to all persons concerned that on the 17th day of June, 2016, the Board of Fire and Police Commissioners of the Village of Willowbrook, Illinois, voted to adopt new Rules and Regulations. Printed copies of the Board's new Rules and Regulations may be obtained from the Office of the Village Clerk, 835 Midway Drive, Willowbrook, Illinois. The rules shall be operable on the 11th day of July, 2016, or 10 days from the date of publication of this notice, whichever date is later.

BOARD OF POLICE COMMISSIONERS MEETING
AGENDA ITEM SUMMARY SHEET

AGENDA ITEM DESCRIPTION

MOTION – Temporary Waiver of Higher Education Requirements

Meeting Date: June 17, 2016

BACKGROUND

Mayor Trilla and Administrator Halik met with Chief Shelton and Deputy Chief Schaller to discuss the status of several current police department matters. During this discussion, the department age statistics that D.C. Schaller pulled together, shift staffing concerns, and the replacement hiring process was considered. This led to a discussion about candidate qualifications and the present candidate pool. One suggestion that was made by police command is that we may want to consider prior military experience in lieu of a Bachelor's Degree, or some reasonable combination of the two, in our patrol officer hiring process. Apparently, this is a trend that our D.C. has seen others towns start to use and could help increase the candidate pool. In addition, some of the training (e.g., following orders, chain of command, etc.) received by military trained individuals is a definite benefit when managing a quasi-military municipal police department. Mayor Trilla agreed with the recommendation and asked that the BOPC consider it as well. We again contacted Attorney Broihier and he responded that the state Board of Fire and Police Commissioners Act was amended effective August 19, 2013 to recognize prior active service in the United States Armed Services **(please see Item No. 7 on the attached Legislative Update).**

REQUEST FOR FEEDBACK (if any)

Attorney Broihier advised that since this provision is now included in the Act, the Commission would merely need to vote on a motion to waive the education criteria as permitted by the statute for this round of testing.

STAFF RECOMMENDATION

Temporarily waive higher education criteria requirements for this round of testing.

LEGISLATIVE UPDATE 11-06-2015

1. P.A. 099-0379 effective August 17, 2015, amends both the Civil Service Act and the Board of Fire and Police Commissioner's Act by adding another exception to the age 35 hiring limitation for individuals applying for a position as a fire fighter. Both statutes prohibit someone who is 35 years of age or older from participating in an examination for a position as a fire fighter unless the individual had been previously employed as a full-time fire fighter with an Illinois municipal fire department or an Illinois fire protection district. With this amendment, individuals who turned 35 years of age while serving as a member of the active or reserve components of any of the branches of the Armed Forces of the United States or the National Guard of any state, whose service was characterized as honorable or under honorable, if separated from the military, and is currently under the age of 40, are now eligible to sit for the examination. This amendment however is not applicable to individuals who desire to test for a full-time fire fighter's position with an Illinois fire protection district.

2. P.A. 099-0402 effective August 19, 2015, amends Section 3.5(a) of the Open Meetings Act allowing a person to file a request for review with the Public Access Counselor beyond the mandatory 60 day filing requirement of the date an alleged violation occurred if that person can prove that, that employing due diligence, the alleged violation was discovered after the expiration of the 60 day filing period. If that is the case, an individual can file such a request within a two year period subsequent to the alleged violation as long as such a request is filed within 60 days of discovery of the violation. The amendment is not applicable to violations which may have occurred prior to the effective date of the amendment.

3. P.A. 098-0650 effective January 1, 2015, amends the Illinois Municipal Code by adding a new section (65 ILCS 5/11-1-12) which prohibits municipal police departments from requiring a police officer to issue a specific number of citations over a given period of time. This amendment also prohibits a municipal department from evaluating an officer's performance by comparing the number of citations issued by an officer with those of other officers performing similar law enforcement duties. This amendment applies to home-rule communities as well as non-home-rule communities but is not applicable to the City of Chicago.

4. P.A. 098-0774 effective January 1, 1915, is entitled "Job Opportunities for Qualified Applicants Act". It is sometimes referred to as "ban the box" and essentially bars an employer from inquiring into an applicant's criminal history until such time as the applicant has been determined to be qualified for the position and is either about to be selected for an oral interview or given a conditional offer of employment. **This legislation does not apply to Civil Service Commissions, Fire and Police Commissions or Boards of Fire Commissions** for several reasons. First, by definition, the term "employer" specifically refers to individuals or "private" entities employing 15 or more employees and does not include public employers such as municipal police or fire departments. Secondly, the new Act specifically exempts positions where employers are required to exclude applicants with certain criminal convictions or the individual is to be licensed under the Emergency Services (EMS) Systems Act.

5. P.A. 098-0760 effective upon becoming law, amends the Civil Service Act, the Fire and Police Commissioner's Act, and, an Act in Relation to Fire Protection Districts as those statutes pertain to the testing and selection of applicants for firefighting positions. In essence, this bill eliminates the requirement that commissions impose a "median" score as a mandatory passing point for written examinations used to screen potential firefighting employees. In addition, the amendment specifically allows the appointing authority to establish a minimum passing point with the caveat that there be adequate evidence to establish the validity of the passing point employed. If a commission chooses to use a passing point to screen applicants taking a written exam, it would be wise to review this issue with the vendor providing the test to insure validation studies have been performed which support the passing point chosen.

6. P.A' 98-0565, effective as of August , 27, 2013, amended Section 705/16.03 of an Act in Relation to Fire Protection Districts as it relates to the appointment of fire commissioners by adding the language shown below:

> "No more than 2 members of the Board shall belong to the same political party Existing in the municipality at the time of the appointments and as defined And as defined in Section 10-2 of the Election Code. If only 1 or no political party exists in the municipality at the time of the appointments, then state or national party affiliation shall be considered in making the appointments. Party affiliation shall be determined by affidavit of the person appointed as

a member of the Board."

The language appearing above seems to have been copied directly from a similar provision found within the Board of Fire and Police Commissioner's Act and the use of the term "municipality" is somewhat confusing since the Illinois Municipal Code (65 ILCS 5/1-1-2) defines the term municipality to mean a city, village, or incorporated town in the State of Illinois and specifically excludes townships as well as counties, school districts, park districts, sanitary districts, or any other similar governmental districts.

7. P.A. 98-0510, effective August 19,2013, amends Section 5/10-2.1-6 of the Board of Fire and Police Commissioners Act by providing that a Board of Fire and Police Commissioners which has a rule requiring applicants for original appointment possess an Associate's Degree in order to apply for a position as a police officer **may waive** that requirement for applicants who have served a minimum of 24 months of honorable active duty in the service of the United States Armed Forces or the applicant has served 180 days of active combat duty in the service of the United States Armed Forces and has not been discharged dishonorably or under less than honorable conditions. If a board's rules require an applicant to possess a Bachelor's Degree as a criteria for application, under this amendment that requirement **maybe waived** if the applicant has served for 36 months of active military duty in the service of the United States Armed forces and has not been discharged under less than honorable conditions or has served a minimum of 180 days of active duty in the service of the United States Armed Forces in combat duty recognized by the Department of Defense and has not been discharged under less than honorable conditions. Please note that the amendment does not mandate that such criteria be waived but simply makes it optional at the discretion of the municipal fire and police commission to which the application was submitted. Unfortunately, the synopsis for this Public Act gave the impression that the new law mandated that the subject rules be waived when in fact that statute simply makes it discretionary with the commission conducting the examination process.

8. P. A. 98-0231 effective August 9, 2013, amends Section 5/10-2.1-6 by allowing a board of fire and police commissioners to award preference points to applicants who have participated in a police explorer or cadet program. The amendment permits an award not to exceed 2 points to applicants participating in such a program within their

own municipal police department. Claims for preference points must be requested by the applicant within ten days of the posting of the initial eligibility list.

9. P. A. 098-1050, effective January 1, 2015, amends the Illinois Human Rights Act and provides that it is a civil rights violation for an employer to refuse to provide a reasonable accommodation to an employee for conditions related to pregnancy, childbirth or a related healthcare condition if the employee expressly requests the accommodation with the advice of her healthcare provider. A reasonable accommodation is defined to mean actions which allow the employee to perform her duties in a reasonable manner including an accessible worksite, acquisition or modification of equipment, job restructuring, and a modified work schedule. Protected under the Act are job applicants, part-time employees, probationary employees as well as employees holding full-time positions. The statute requires the employee and employer to engage in a timely, good faith, and meaningful exchange to determine effective reasonable accommodations. While the amendment lists a number of potentially reasonable accommodations for existing employees, it does not specifically address the issue of an applicant who cannot participate in strenuous training required to achieve one's law enforcement certification.

Questions related to the foregoing legislation may be directed to the Association's attorney, John C. Broihier, at:

Local Tel.:	630 470 9774
Toll Free Tel:	800 437 2215
E Mail	jbroihier@broihierlaw.com

CASE LAW UPDATE

1. Wheeler v. The Board of Fire and Police Commissioners of the Village of Maywood et. al., 2015 Il. App. (1st) 140453-U, June 26 2015. The plaintiff in this case filed a suit for Administrative Review after being terminated from his position as a police sergeant for violating the Village's residency ordinance and for being untruthful re the reporting of his residence to the department. The record shows that the Village had a valid ordinance requiring its employees to reside within a 15 mile distance of the village's municipal boundaries and the plaintiff had signed a document indicating that he was aware of the ordinance. During his term of employment, the plaintiff moved his principal residence from the Maywood area to a location in St. Charles, some 30 miles from the nearest Maywood municipal boundary. At the same time, he notified the department that he was residing at a residence (condo) in Chicago located within the 15 mile perimeter mandated within the residency ordinance. The condo was owned by his brother and the plaintiff claimed to pay rent, on a monthly basis, to lease one room within the condo which he claimed as his residence. The plaintiff was unable to produce any lease agreement or proof that he paid any rent to the condo owner.

   In contrast, the department produced documents (including mortgage documents, tax documents, and documents filed with other public entities), wherein the plaintiff claimed/identified the St. Charles address as his primary residence. Plaintiff defended his actions, in part, by arguing that nothing in the residency ordinance precluded an employee from owning two residences at the same time.

   The record showed that the plaintiff had a fairly exemplary disciplinary record which the commission considered before rendering its decision to terminate the officer's employment. Having done so, the commission concluded that the residency violation and being untruthful regarding same, were a substantial shortcoming warranting discharge. The circuit court, 3 and ½ years after the lawsuit was initially filed, issued its memorandum and opinion upholding the board's decision finding that the plaintiff's conduct constituted a substantial shortcoming but remanding the matter back to the commission for consideration of a sanction short of discharge.

   On remand, the board did review the facts and considered the court's order but concluded that discharge was appropriate for several reasons. First, the statute

only allows a commission to suspend an employee for 30 days without pay or discharge. Since the plaintiff had been off duty for more than 3 ½ years, to suspend for only 30 days would place a substantial financial burden upon the Village. More importantly, serving a suspension did not seem to be much of a deterrent in the event other employees chose to ignore the Village's residency ordinance. Respectfully, the commission entered a second decision affirming its earlier decision to terminate the employee's employment. That second decision, while noting the earlier evidence presented in the hearings, also reminded the court of the limited secondary discipline afforded by the statute and the burden re-instatement would create for the Village. Never the less, the circuit court than vacated its earlier order and held that the commission's decision was contrary to the evidence presented and order that the plaintiff be re-instated.

Fortunately, the appellate court reviews the decision of the administrative agency and not the reviewing circuit court. In this case, not only was the record clear as to the existence of a valid residency ordinance along with the plaintiff's violation thereof and his untruthfulness re same, but existing case law supports a decision to terminate the employee who violates a municipal residency ordinance or a police officer found to be untruthful by an administrative agency. The appellate court held in favor of the commission's decision to discharge the plaintiff and reminded the lower court that it is not to replace the administrative agency's decision with its own simply because it believes a lesser sanction would be more appropriate.

2. Spah v. City of Colona, 2015 IL App (3d) 149915-U, April 7, 2015. The record shows, that after a hearing on the merits, the Colona Board of Fire and Police Commissioners entered a final decision finding that he was guilty of misconduct and terminating his employment. Plaintiff filed a suit for administrative review and the city filed a motion to dismiss the suit for want of jurisdiction. The administrative review law requires a plaintiff to file a complaint for administrative review within 35 days of service of a written, final decision, upon the parties. The law also requires that the complaining party name all other parties of record as defendants in the action. Failure of a complainant to comply with these basic criteria in a timely manner causes the circuit court to lose jurisdiction and in this case resulted in the dismissal of the complaint. Naming only the City of Colona as a party defendant and the failure to name the fire and police commission and the police department as parties proved fatal to the plaintiff. There was a secondary

issue, not considered due to the plaintiff's faulty filing, related to whether or not the hearing body was properly constituted because two of its members were also members of the Colona zoning board of appeals in violation of 65 ILCS 5/10-2.1-3 which would preclude them from serving as members of the board of fire and police commission.

3. Spoerry v. The Board of the Lakemoor Police Commission for the Village of Lakemoor et. al., 2015 IL App (2d) 140987-U. The facts show that the plaintiff was hired as a police officer in 1994 and promoted to the position of police sergeant by the Lakemoor village board in 2000. In 2010, the plaintiff was notified that he would be reduced in rank due to changes in the economy. In April 2011, the village's population was certified as being over 5000 and became subject to the Board of Fire and Police Commissioners Act (65ILCS 5/10-2.1 et seq.) and, in September 2012, the commission posted its first promotional eligibility list for the position of sergeant. The plaintiff was second on the list and the commission promoted the top ranked candidate to the position. It was at this time that the Plaintiff filed a lawsuit arguing that he was not properly notified and advised as of alleged lawful opportunity for reappointment to his former rank pursuant to the Civil Service Act or the Board of Fire and Police Commissioners Act.

   The evidence clearly shows that the plaintiff was never appointed to the full-time position of police sergeant by either a civil service commission or a board of fire and police commissioners since the Village had never enacted an ordinance creating a civil service commission and the provisions of the Fire and Police Commissioners Act were not applicable prior to April 2011, after his appointment to the sergeant's position and subsequent to his later reduction in rank. The circuit court dismissed the plaintiff's complaint with prejudice—said decision being upheld by the appellate court which concluded that the plaintiff's due process arguments lacked merit since the village was never subject to the Civil Service Act and did not become subject to the Board of Fire and Police Commissioners Act until 2011 after the action to reduce the plaintiff in rank was taken by the Village Board.

4. City of Des Plaines v. Metropolitan Alliance of Police, 2015 Ill. App. (1st) 140957, March 31, 2015. The City attempted to terminate the employment of a police officer related to his multiple use of excessive force against several arrestees and his failure to report or otherwise document the incidents after their occurrence.

These issues were the subject of grievance arbitration with the end result being that the arbitrator found the officer was guilty of the misconduct as alleged and had violated the department rules as charged. Nevertheless, the arbitrator ruled that the officer was entitled to reinstatement without back pay with his time served away from work as his disciplinary suspension. He was also subject to a last chance agreement should he act in a similar manner within the next three years.

The evidence established that the officer had been involved in three incidents of excessive force including: 1) opening the backseat door of his squad car and punching a handcuffed arrestee in the face in order to distract the arrestee so he could check to see if the handcuffs were still secure; 2) punching an arrestee in the face while moving the subject from his cell to a holding cell (ultimately determined to be justified force); and, 3) pushing an arrestee after the subject made derogatory (vulgar) remarks about the officer's daughter.

With respect to the first incident, the arbitrator found the officer's testimony to be not even remotely credible concluding as well that the officer had been untruthful when describing the incident during his departmental interrogation. The arbitrator found that the officer's claimed defense was "absolute nonsense" and held no water whatsoever. As to the second incident, the arbitrator determined that the officer's actions may have been justified but the record showed he had failed to report the incident. The arbitrator concluded that the force employed by the officer during the third incident was not justified and the evidence showed that he had not filed a report as to his conduct on that occasion.

The arbitrator faulted the Bloomington Police Department holding that its delay in its investigation of the incidents may have caused some prejudice to the officer since video evidence was no longer available and the passage of time may have dimmed witnesses' memories. In addition, he concluded that, while some of the department's command staff had been made aware of these events, their failure to take corrective action in a timely manner sent a signal that such misconduct was acceptable.

The City chose to contest the arbitrator's decision and the circuit court reversed the arbitrator's decision to re-instate the officer finding that the City had clearly established it was against public policy for police officers to assault prisoners and then to lie about matters related to the performance of his or her specific duties. The circuit court expressly faulted the arbitrator for her failure to give an opinion as to the likelihood of the officer to repeat his misdeeds in the future.

By noting that the arbitrator had failed to opine as to the possibility of recidivism on the part of the officer, the Appellate Court has remanded this matter back to the arbitrator and given the distinct impression that should the arbitrator opine that the officer is unlikely to repeat the misconduct, it will affirm the arbitrator's decision to re-instate the officer. This is a Supreme Court Rule 23 decision.

5. Scott Lorence v. Board of Fire and Police Commissioners of the Village of Norridge et. al., 2015 Ill. App (1st) 133057-U. The plaintiff in this case was found guilty of several acts of misconduct and multiple departmental rule violations stemming from his actions while intoxicated at a bar in unincorporated Cook County. The record showed that the plaintiff hosted a party at his home where he and a number of his guests consumed alcoholic beverages while watching a playoff football game. After the game concluded, the plaintiff and several of his guests decided to go to a local tavern where the drinking continued. The plaintiff, at the hearing, testified that he did not drive himself to the tavern since he believed he had already equaled or exceeded the statutory limited for a DUI. While at the bar, an altercation occurred involving a fellow Norridge police officer and other patrons and the Cook County Sheriff's Department was called to quell the disturbance.

   The plaintiff, who was not involved in the original altercation, failed to obey the directions of the various Cook County Sheriff's Deputies who were dispatched to the site. Instead, the plaintiff acted in a belligerent manner toward the deputies verbally stating that the county deputies weren't worth shit, using a racial slur against one of the deputies, becoming combative and otherwise acting in a disorderly manner making it more difficult for the deputies to perform their duties. While there was some conflicting evidence as to the plaintiff's alleged misconduct offered by the bar owner, a relative and friends of the plaintiff, the testimony provided by the deputy sheriffs and a Norridge Police Department supervisor clearly established that the plaintiff was intoxicated at the time of the incident, had acted in a very disorderly manner, had failed to obey the directions of the county deputies, and had lied with respect to having a firearm in his possession during the incident.

   Having concluded that the plaintiff was guilty of the acts of misconduct set forth in the charges, the commission chose to terminate the plaintiff's employment after considering matters of aggravation and mitigation including a disciplinary

record showing 14 separate disciplinary proceedings (one a 5 day suspension for a DUI arrest in Alabama where the police had to threaten him with a taser to control his actions. Both courts affirmed the decision to discharge the plaintiff from the Norridge Police Department. This is a Supreme Court Rule 23 decision.

6. Paul Gomez v. Board of Fire and Police Commissioners of the Village of Norridge Park, 2014 IL. App (1st) 134034-U (January 14, 2015). This is a companion case to the Lorence case cited above. Plaintiff was a fellow police officer of Scott Lorence and a member of the Norridge Police Department. He was in attendance at a party hosted by Lorence. While at the party, he had been drinking and, according to another guest, appeared to be intoxicated when he left the party and drove to a nearby tavern. At the tavern he became involved in a verbal and physical altercation with other patrons and was forcibly removed from the bar at the request of the bartender. A video tape of the premises showed the plaintiff drinking at the bar, banging his ammo clip on the bar and placing his firearm on the bar top. The weapon and ammo clip were taken by the bartender and placed in a safe in the tavern. The plaintiff and Scott Lorence were known to the other patrons to be members of the Norridge Police Department.

   Fifteen minutes after his removal from the bar, the plaintiff returned with two friends demanding that his car keys be returned. A second altercation occurred and the owner of the bar called the Cook County Sheriff's department to quell the fighting. Plaintiff was observed by several witnesses, including sheriff's deputies and a supervisor from his own department who testified that he was intoxicated. The plaintiff was escorted outside where he became uncooperative with his supervisor refusing to leave the premises and go home instead demanding that his car keys be returned to him. The plaintiff was overheard cursing saying in essence: "fuck this, I am not going until I get my fucking keys. They are not going to tow my fucking car. I am not going, I want my keys."

   During the aggravation and mitigation phase of the hearing, the record indicated that the plaintiff had a reasonably good work record with a minor record of previous discipline. He testified to certain personal and professional issues in his life which were a cause of anxiety and also argued that other members of the Norridge Police Department have been observed as intoxicated in public without being disciplined for their conduct. The Chief of the department testified that he wanted the plaintiff discharged from the department because he was concerned

about the public's safety since the plaintiff, who lost control of his weapon, was publicly intoxicated and demonstrated extremely poor judgment.

With respect to the plaintiff's argument that he was the subject of disparate treatment, the court noted that there was no specific evidence of other Norridge Police Officers being observed as intoxicated in public or acting in a similarly disorderly manner? In addition, the court concluded that the commission's decision that the plaintiff was guilty of violating departmental rules regarding public intoxication and disorderly conduct was supported by the manifest weight of the evidence.

7. Degroot v. Village of Matteson, No. 13-cv-08530. U. S. District Court for the Northern District of Illinois Eastern Division. Plaintiff had been given a conditional offer of employment as a Matteson firefighter subject to successfully completing an in-depth psychological examination and medical examination. While he had successfully completed the psychological exam, the conditional offer of employment was withdrawn by the fire and police commission prior to taking a medical exam. The reason the offer was withdrawn was that the Village Board had placed a temporary hiring freeze on the appointment of new firefighters. Shortly after the conditional offer was revoked, the eligibility list expired and a new list was posted. Subsequent to posting the new list, the Village Board authorized hiring three new firefighters who were then appointed off the most recently posted list. Plaintiff sued the Village claiming that its failure to appoint him to one of the positions violated his constitutional right to due process, violated his First Amendment rights and constituted a breach of contract. He also argued that he had a protected interest under a theory of promissory estoppel.

The Village filed a motion to dismiss all counts of the complaint. As to the plaintiff's argument that his procedural due rights were violated, the court noted that the plaintiff must have more than a unilateral expectation of a claimed interest. To have a property interest, a plaintiff must show that the claimed interest is independently protected such as by state statute or a clearly implied promise of continued employment. The court determined, in this case, that the plaintiff did not have a clear property interest subject to due process protection. In this instance, plaintiff had never been appointed to a full-time firefighter position and thus was not protected under the provisions of the Fire and Police Commissioner's Act, and, even if he had been appointed, he would not be entitled to a due process

hearing until after he had successfully completed his probationary period. Accordingly, the court dismissed the first count of the complaint.

As to the breach of contract allegation, the Village argued that no enforceable contract existed, and if it did, the allegations found in the complaint did not rebut the presumption of at-will employment. In Illinois, the law provides that in an at-will employment relationship, either party may terminate the employment at any time without liability for breach of contract. The court agreed with this argument and dismissed the count alleging breach of contract.

The plaintiff was given the opportunity to file an amended complaint against the Village regarding his claims related to violation of his First Amendment rights, and breach of contract and promissory estoppel claims.

8. Spoerry v. Village of Arlington Heights, Arlington Heights Fire and Police Commission et. al., 2014 IL. App (1st) 132007-U, June 17, 2014. This case involves a challenge to the sergeants' promotional process employed by the Arlington Heights Board of Fire and Police Commissioners. To make the list, a candidate must achieve a passing score of 70% on the written exam, undergo a departmental evaluation for merit and efficiency, and undergo an oral interview as well. The written exam is weighted 50% and the departmental evaluation and oral interviews are weighted 25% each. Upon completion of the testing process, the plaintiff had the second highest written test score, was awarded an 80% rating during the course of the oral interviews, but received the lowest score (14.40) of all candidates for the departmental evaluation. The fire and police commission posted the final, adjusted, promotional eligibility list on April 20, 2012, and plaintiff filed a complaint for administrative review on May 16 2012. On April 27, 2012, a personnel order was entered by the Village confirming that the top two candidates on the sergeants' promotional eligibility list would be promoted as of May 21, 2012. On February 8, 2013, the plaintiff moved for a stay against the fire and police commission in an effort to try and stop the appointment of the two officers to the sergeant's rank. This motion was denied as moot since the appointments in question had taken place several months earlier.

In his complaint for administrative review, the plaintiff argued that the testing process employed by the fire and police commission failed to meet the criteria set by state law and the commission's own rules. In particular, the plaintiff argued that the process to establish departmental merit and efficiency failed to meet the competitive standard required by the statute in that the rating process employed by the department constituted no more than a "popularity" contest.

In its analysis, the Appellate Court noted that the Fire and Police Commissioners' Act, specifically authorizes a commission to make rules and regulations governing the employment, promotion and discipline of police officers and firefighters and more specifically states that a board, by its rules, shall provide for promotion in the ...police department on the basis of ascertained merit, seniority in service, and examination. The court ruled that the board's and the department's rules complied with the state statute. As to the plaintiff's argument that the rating system employed by the department had no clear or definable standards and was tantamount to a "popularity contest, the court concluded that guidelines regarding personnel evaluations cannot be precise or all-embracing—something must be left to the judgment and experience of the evaluators. Specifically, the court stated that:

> "With such discretionary and subjective issues at play in determining merit and ranking of candidates, any method of selection will have some possibility of favoritism or partisanship and absolute precision and objective measuring of merit is impossible in such human endeavor."

The court went on to hold that nothing in the Municipal Code or the Board's rules bars this type of evaluation and that the plaintiff failed to demonstrate that input from departmental supervisors makes the promotion process clearly erroneous, arbitrary, or unreasonable.

9. Bauer v. Eric Holder, Jr., Attorney General, Department of Justice, Case No. 1:13-cv-93, United States District Court For The Eastern District of Virginia, (June 10, 2014). The Plaintiff failed a physical fitness test which was a prerequisite for all new FBI agent trainees. The physical fitness test given by the FBI is gender normed and the Plaintiff failed meet the 30 push-ups required of male trainees. Female trainees are required to do 14 push-ups. The record indicates that this physical agility test is the only mandatory physical fitness test given during an agent's career even though the validation study suggested provided by the testing vendor suggested the FBI adopt a mandatory physical fitness test for incumbent FBI agents. The FBI has a voluntary fitness test for incumbent agents and the norm for push-ups, recommended by the Cooper Institute, for agents ages 30-39 is 24. At issue in this case was whether or not the Defendant's use of a gender-normed physical fitness test violates Federal Anti-Discrimination laws prohibiting

employment discrimination generally and anti-discrimination laws specifically prohibiting the use of discriminatory standards on employment related claims.

The court's analysis in this case is quite straight forward and easy to follow. First, governing law, simply put, provides that it shall be an unlawful employment practice for an employer, in connection with the selection or referral of applicants or candidates for employment or promotion, to use different cut-off scores for employment related tests on the basis of sex. The law allows for an employer to defend its use of separate norms if the employer can demonstrate that a gender-based policy is a bona fide occupational qualification.

The court found that the test in question discriminated against the Plaintiff based upon the Plaintiff's sex, male. In its summary, the court found that gender-normed physical fitness tests present a challenge. In this case, both male and female agents are required to perform the same physical job tasks such as restraining or chasing a subject. The conclusion reached by the court is that since both male and female agents are expected to perform these tasks at the same level, then testing males and females according to different standards cannot be an objective measure of a person's ability to perform these tasks.

The Cooper Institute developed the "Power Test" used by various police training academies/institutes in the State of Illinois. The Power Test is not a physical agility/ability test. It is a wellness/fitness test and should not be used to screen applicants for placement upon a register of eligibles for appointment to law enforcement positions. Not only is the test gender-normed but it is also normed based upon an applicant's age. Requiring an applicants to provide proof that they have successfully passed a gender-normed physical fitness test may result in a Commission being sued for sex discrimination.

10. Chamberlain v. Village of Gurnee Civil Service Commission et al., 2014 Il. App. (2d) (February 19, 2014). The plaintiff in this case is a firefighter who ranked first upon a Fire Lieutenant's Promotional Eligibility List and was passed over for promotion due to issues related to his work performance and incidents of misconduct. Unlike the "rule of three" which gives a board great discretion with respect to promotions within the police department, the Fire Department Promotion Act and the Collective Bargaining Agreement (CBA) governing fire department promotions in this case provides that a board "shall" have the right to pass over the highest ranking person only if it is demonstrated that the promotional candidate has substantial shortcomings in work performance or has engaged in

misconduct affecting the person's ability to perform the duties of the promoted rank. That language, concluded the Appellate Court, was sufficient to hold that the plaintiff held a constitutionally protected interest in the pending promotion affording him the right to due process prior to denial of the promotion.

The department notified the civil service commission that it was seeking to have the plaintiff by-passed for promotion by filing with the commission a copy of the plaintiff's administrative statement regarding four recent on the job incidents along with the written statements of the plaintiff's fellow firefighters, paramedics and a nurse who was working with the plaintiff as part of an emergency transport to a nearby hospital. In summary, the four incidents involved the plaintiff making a rude and unprofessional comment to an injured person at the scene of an accident, in the presence of civilians at another accident scene referring to his co-workers as idiots and dumbasses, responding unprofessionally to a nurse while assisting in an emergency ambulance transport and again at the hospital upon arrival, and, and getting into a verbal altercation with a fellow firefighter during which the plaintiff used degrading and unprofessional language including use of the "f" bomb.

While Plaintiff's counsel requested a formal hearing to refute the allegations of misconduct referred to in his administrative statement and the statements of his co-workers filed with the commission, the commission declined to conduct a hearing and held a special meeting of which the plaintiff's counsel had notice. A significant issue raised by the plaintiff's counsel concerned the admission of hearsay evidence (written statements of his coworkers and the nurse) depriving the plaintiff of the ability to cross examine those individuals as to the truth of their statements. In determining whether or not the admission of hearsay in this case violated the plaintiff's due process rights, the Appellate Court weighed three factors to make that determination: 1) the nature of the private/protected interest—i.e. a prospective promotion; 2) the risk of an erroneous deprivation of the plaintiff's interest through the procedure used; and, 3) the government's interest – the practical burden of providing more (a hearing) or a substitute process. The Appellate Court concluded that the loss of a promotional opportunity was not as significant, in the overall scheme of things, as a termination of employment or a demotion in rank with its associated loss of income. As to the possibility of an erroneous deprivation of the plaintiff's interest, the court recognized that the decision was rendered by a professional fact finding committee, that the plaintiff was represented by counsel and that through the admission of his administrative

statement the plaintiff did have an opportunity to address the accusations against him and to provide denials, explanations and clarifications. The court also noted that the plaintiff could have filed statements of his coworkers supporting his position but did not do so. Finally, to eliminate the use of hearsay the defendant commission would have had to conduct judicial hearing (tantamount to a judicial trial) where scheduling could be problematic, costs would be increased, and the government's interest in efficiency (as to both time and money) impaired. Based upon the foregoing, the Appellate Court concluded that the defendant commission's consideration of hearsay evidence, in the form of written statements, against the plaintiff was not a violation of procedural due process. The Appellate Court upheld the findings and decision of the civil service commission by-passing the plaintiff for promotion and awarding the promotion to the second ranked candidate on the list. Note: This is a Rule 23 decision and cannot be cited for its precedential value.

11. Bradford v. Police Chief Byrne and the Lombard Board of Fire and Police Commissioners, U. S. District Court for the Northern District of Illinois Eastern Division, 11 C 37 (February 7, 2014). The plaintiff, a twelve year veteran of the Lombard Police Department, was terminated for cause by the Lombard Board of Fire and Police Commission. He sought Administrative Review of that decision by the U. S. Federal District Court alleging that the commission's decision was against the manifest weight of the evidence, and that the record did not support a finding of cause for discharge.

    The evidence showed that, while on his way to work, the plaintiff, driving his personal vehicle in icy, winter conditions, lost control and slid off the road striking a village fire hydrant causing damage to the hydrant and his own pickup truck. Two witnesses, who reported the incident to a Lombard Police Department dispatcher, reported an individual striking the hydrant with a motor vehicle, leaving the vehicle to inspect for damage, and then driving away from the scene of the accident. The two witnesses also reported seeing the vehicle in question being driven to and left in the Lombard Police Department parking area. The record also shows that the plaintiff reported for duty and failed to report the incident for approximately 45 minutes after roll-call and only after becoming aware that a department supervisor was looking at the damage to his truck. The department did conduct an investigation into the incident and determined that the plaintiff had been less than truthful as to his version of the facts related to the incident.

For example, the plaintiff denied exiting his vehicle at the time of the accident to view the damage to the hydrant or his vehicle. To the contrary, two eye witnesses to the accident report seeing him get out of his vehicle, inspect the damage and then leave the scene of the accident. A tape of the witness's report of the accident to the dispatcher confirmed the eye witness report stating that the plaintiff had exited his vehicle. The plaintiff repeatedly denied, during the course of the investigation, being aware that his vehicle had struck the hydrant until he went back outside after roll call and saw a sergeant of the department looking at his vehicle. The commission made a specific finding that the testimony of the eye witnesses and several departmental employees testifying at the hearing to be credible and finding the plaintiff's testimony to be not credible.

The commission found the plaintiff to be guilty of damaging public property, failing to report a motor vehicle accident, and making untruthful statements in an effort to cover-up the accident. The board further found that such misconduct constituted a substantial shortcoming warranting the termination of the plaintiff's employment. The court, relying on earlier legal precedent ((see Brady v. Maryland, 373 U.S. 83 (1963)), noted that prosecutors are required to disclose to criminal defendants that the hearing board found the plaintiff to be untruthful while responding to questions posed to him during a formal interrogation implicating him in a possible criminal offense. As such, the credibility of the plaintiff would be a detriment to the department and the prosecutor's office whenever the plaintiff would be required to testify in court.

12. Scrivener v. Mount Vernon Board of Fire and Police Commissioners et. al., 2013 Ill. App. (5th) 120345 (Mar. 27, 2013). The plaintiff, herein, filed for administrative review of the defendant board's decision to terminate his employment for violating several departmental rules and regulations. The plaintiff was charged with violating the City's and the department's rule mandating that its employees reside within the territorial boundaries of Jefferson County, Illinois. The Chief of the department was made aware if the fact that mail to the address of record for the plaintiff was being returned. The evidence showed that the plaintiff and his wife, while going through a divorce, had sold their former residence and that the plaintiff was now living with his parents.

When asked to verify his residence, the plaintiff gave an address located within the City of Mount Vernon. That address, unfortunately, was assigned to a vacant lot owned by the plaintiff's father. The plaintiff was given another chance

to verify that he was living within the prescribed boundaries and he provided an address for an allegedly leased residence which proved to uninhabitable. The evidence presented at the hearing showed that he had been living with his parents for a period of time and that their residence was not in Jefferson County. The record also showed that the Plaintiff had abused the departmental sick leave policy which requires an employee, upon calling in sick, to remain at home unless hospitalized or visiting their doctor. The evidence showed that the plaintiff had called in sick and then traveled to his ex-wife's residence to visit with his children. The court upheld the board's finding that the plaintiff's misconduct constituted a substantial shortcoming noting that not only was he in violation of the residency rule, he also violated the department's sick leave policy, and, was untruthful throughout the department's investigation. The court, in its review of the evidence, stated that any rational trier of fact would have reached the same conclusion as reached by the commission. The appellate court went on to conclude that the Board's findings of cause for termination were clearly related to the requirements of his service and were not arbitrary or unreasonable. This is a Rule 23 decision and is not to be cited as precedential.

13. Barber v. Village of Bradley, Illinois and the Bradley Board of Fire and Police Commission, 2014 IL. App. (3d) 130339-U, (August 14, 2014). At issue in this case was whether or not the filing of a notice of retirement created a vacancy within the Lieutenant' rank of the Bradley Police Department prohibiting the Bradley Board of Fire and Police Commissioners from striking the names of the remaining candidates from the Lieutenant's existing eligibility list after the names had been on the list for 3 years. The Board of Fire and Police Commissioner's Act, specifically 65 ILCS 5/10-2.1-15, provides in part that a commission shall strike the names from a promotional eligibility list after the names have been on the list for three years unless, at the times the names were to be stricken, a vacancy existed within the promotable rank. The record shows that a notice of retirement from the lieutenant's position was received in May of 2009 with the lieutenant actually retiring as of July 1, 2009. Due to budget constraints, the commission was not asked to fill the position and the corporate authorities subsequently passed a budget ordinance which effectively eliminated a deputy chief position as well as one of the lieutenant positions. In October 2009, the plaintiff's name as well as two others were stricken from the list after its 3 year expiration date. The trial court held that the simple filing of a notice of retirement did not automatically

create a vacancy in that position, that the Village had the authority to eliminate ranks within the department, and that there had been no request, as required within the commission's rules, for the commission to make a lieutenant's promotion off the then existing list. The appellate court affirmed the decision of the trial court.

Questions related to the foregoing information or to the hiring, promotion or discipline of police officers or firefighters can be directed to the Association's Attorney, John Broihier, at the telephone numbers and e mail address shown below.

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