

**IN THE CIRCUIT COURT FOR THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA**

OFFICER WILLIAM GIPSON,

Petitioner,

v.

CASE NO.: 07-CA-9861

WRIT NO.: 07-45

**CITY OF ORLANDO POLICE
DEPARTMENT,**

Respondent.

Petitioner for Writ of Certiorari from the
Decision of the Orlando Police
Pension Board of Trustees.

Nicholas A. Shannin, Esquire,
for Petitioner.

Stuart A. Kaufman, Esquire
For Respondent.

Before MACKINNON, LEBLANC, and KIRKWOOD, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Officer William Gipson, seeks review of Respondent, the City of Orlando, Police Pension Board of Trustees' (Board) final order dated July 11, 2007, amended July 26, 2007, denying his application for service-connected disability pension funds. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Petitioner became a member of the Orlando Police Department (OPD) on March 14, 1994. His pre-employment physical examination failed to reveal any pre-existing condition that would preclude him from receiving disability pension funds.

On June 28, 2005, Petitioner was on a moving walkway at Orlando International Airport when he noticed one of the conveyor plates was rattling, giving him reason to believe that it was about to break. When Petitioner stepped over the rattling plate to try to shut off the conveyor, the plate he stepped on collapsed, causing his right ankle to go through the conveyor. As a result, he suffered injuries to his right ankle, lower back, and hip.

Petitioner was initially evaluated by Dr. McBride and diagnosed with a sprain of the right ankle and the cervical, lumbar, and right hip area. Petitioner was also treated by Dr. Tall who completed a physician report stating that Petitioner's condition was permanent and he had a disability rating of six percent. Dr. Tall further opined that while Petitioner's condition could be controlled by medication, it could not be controlled to the extent that Petitioner could continue to perform his duties as a police officer. Dr. Tall concluded that Petitioner's medical condition rendered him unfit to perform the duties of Petitioner's rank as a police officer.

Dr. Gerber treated Petitioner for pain management and also completed a physician report stating that Petitioner is permanently and partially disabled from his present job but is able to work light duty. Like Dr. Tall, Dr. Gerber opined that Petitioner's condition could not be controlled by means other than medication or surgery and Petitioner's condition rendered him unfit to perform the required duties of a police officer.

Petitioner was sent for an independent medical examination on September 5, 2006, with Dr. Zahrawi who opined that Petitioner had an abnormality in his cervical spine prior to the recent injury and such abnormality continued to be present after the recent injury. Unlike Dr.

Tall and Dr. Gerber, Dr. Zahrawi concluded that Petitioner did not have a medical condition that would prevent him from performing his duties as a police officer. Dr. Zahrawi further found that Petitioner's complaints were mostly subjective because there was a lack of objective findings in the cervical and lumbar area. Given these findings, Dr. Zahrawi stated that he would not place any permanent physical restrictions on Petitioner.

On or about May 8, 2006, Petitioner submitted his application for line-of-duty disability pension funds, which was denied by the Board pursuant to its final order dated July 11, 2007, and amended July 26, 2007. The Board concluded that Petitioner's accident did not render him totally or permanently disabled from performing his required duties as a police officer. Petitioner subsequently sought certiorari review with this Court.

This Court's review of an administrative agency decision is governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the decision was supported by competent substantial evidence. Haines City Cmty. Dev. v. Heggs, 658 So. 2d 530 (Fla. 1995). "It is neither the function nor the prerogative of a circuit court to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." Dep't of Highway Safety & Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

Chapter 12, Article I, of the Code of the City of Orlando sets forth the pension fund and retirement plan (Plan) that is applicable to members of the City of Orlando Police Department. Section 9 of the Plan governs line-of-duty disability and provides that "[a]ny active member of the police department who shall become permanently and totally disabled, if the disability is directly caused by and attributable to the performance of duty as a member of the department, shall be entitled to a monthly pension." Orlando, Fla., Code ch. 12, art. I, §9(1) (2007). This

petition for certiorari review concerns the Board's denial of Petitioner's application for line-of-duty disability pension funds.

Petitioner first argues that the Board's decision occurred in a manner that deprived Petitioner of his procedural due process rights. Next, Petitioner asserts that the Board's decision departed from the essential requirements of the law. Lastly, Petitioner argues that the Board's decision to deny his application for line-of-duty disability pension funds is not supported by competent substantial evidence. Alternatively, the Respondent maintains that Petitioner was afforded due process, the Board did not depart from the essential requirements of the law, and the Board's amended order is supported by competent substantial evidence.

Procedural Due Process

Petitioner argues that the Board deprived him of his procedural due process rights by failing to engage in official deliberations prior to denying his application for disability pension funds. On the other hand, Respondent asserts that Petitioner has failed to demonstrate a denial of due process because the length of deliberations does not illustrate a failure on behalf of the Board to properly perform its duties.

“Procedural due process requires both fair notice and a real opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” Massey v. Charlotte County, 842 So. 2d 142, 146 (Fla. 2d DCA 2003)(citing Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth., 795 So. 2d 940, 948 (Fla. 2001). Moreover, “the specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding.” Id. It is undisputed that Petitioner was given fair notice and afforded an opportunity to be heard by the Board. Petitioner was represented by counsel and both he and his wife were permitted to testify at the hearing.

However, Petitioner disputes whether the Board fully and properly considered his application because there was no discussion during the actual deliberation phase of the hearing.

Contrary to Petitioner's assertion, the events that took place at the hearing do not evidence a deprivation of procedural due process rights. The record indicates that the Board asked Petitioner questions throughout the hearing and also read aloud the standard regarding permanent and total disability prior to making a motion. Accordingly, this Court finds that there was no deprivation of procedural due process rights as Petitioner was given fair notice and an opportunity to be heard at a meaningful time and in a meaningful manner.

Failure to Observe Essential Requirements of the Law

Petitioner next argues that the Board failed to observe the essential requirements of the law by failing to apply the correct standard regarding permanent and total disability. Respondent asserts that the Board applied the correct standard as evidenced by the findings of fact and legal conclusions in the amended final order.

According to Section 8 of the Plan, the term "permanently and totally disabled" means and includes "the loss of one or more limbs, loss of sight in one or both eyes, loss of hearing in one or both ears, and any other condition which renders the member unfit to perform the required duties of the member's rank held at the time of impairment." Orlando, Fla., Code ch. 12, art. I, §8(1) (2007).

Prior to making its decision, the Board reviewed the proper definition of "permanently and totally disabled" as demonstrated by the hearing transcript contained in the record. Furthermore, the Board reiterated the proper issues for determination of an application for line-of-duty disability pension benefits in the amended final order. The Board's use of the term "partial" in the amended final order was not a misapplication of the law but rather a reference to

the term used by Petitioner's treating physicians. Therefore, this Court finds that the record does not demonstrate a failure by the Board to observe the essential requirements of the law.

Competent Substantial Evidence

Petitioner's third argument is that the Board's decision is not supported by competent substantial evidence because Petitioner's treating physicians opined that there was a medical condition present that would prevent Petitioner from performing his job as a police officer. On the contrary, Respondent maintains that the Board's reliance on Dr. Zahrawi's conflicting report is sufficient to constitute competent substantial evidence.

On review of a decision by the Board, the function of this Court is not to substitute its judgment or discretion for that of the Board's, nor is it to reweigh evidence on disputed findings of fact where there is competent substantial evidence in the record. Allen, 539 So. 2d at 21. In addition to the medical reports of Petitioner's treating physicians, the Board also considered Dr. Zahrawi's independent medical examination and deposition testimony which was introduced into evidence. Dr. Zahrawi is board certified in orthopedic surgery, has been practicing for more than 20 years, and appears to have good medical credentials. Upon weighing all of the evidence presented, the Board concluded that Petitioner was not totally or permanently disabled from performing his required duties as a police officer. Even though Dr. Zahrawi's opinion and deposition testimony is in conflict with the other doctors, his testimony is "neither inherently incredible nor improbable and thus it alone constitutes" competent substantial evidence to support the Board's order. See Pompano Beach Police and Firemen's Pension Fund v. Franza, 405 So. 2d 446, 447 (Fla. 4th DCA 1981).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED** and Petitioner's Motion for Attorney's Fees and Costs is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
__1__ day of __December_____, 2008.

_____/S/_____
CYNTHIA Z. MACKINNON
Circuit Court Judge

_____/S/_____
BOB LEBLANC
Circuit Court Judge

_____/S/_____
LAWRENCE R. KIRKWOOD
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **Nicholas A. Shannin, Esquire**, 214 East Lucerne Circle, Orlando, Florida 32801, **Stuart A. Kaufman, Esquire**, 10059 NW 1st Court, Plantation, Florida 33324, and **Rochelle L. Burlon, Pension Coordinator**, City of Orlando, Post Office Box 4990, 400 S. Orange Avenue, Orlando, Florida 32801 on this __1__ day of
____December_____, 2008.

_____/S/_____
Judicial Assistant