

## Minutes Tempe Fire Public Safety Personnel Retirement Board September 10, 2009

Minutes of the Tempe Fire Public Safety Personnel Retirement Board, held on Thursday, September 10, 2009, 3:00 p.m., Tempe City Hall – Mayor’s Office, 31 E. 5<sup>th</sup> Street, Tempe, Arizona.

**Board Members Present:**

Mayor Hugh Hallman  
Joe Brosius  
James Foley  
Matt Tripoli  
Rich Woerth

**Board Members Absent:**

**City Staff Present:**

Jan Hort, Clerk’s Office  
Lourdes Robertson, Human Resources

**Others Present:**

David Niederdeppe, Attorney for the Board  
Steve Baker

Mayor Hallman called the meeting to order at 3:05 p.m.

**ITEM I – Consideration of Meeting Minutes: August 20, 2009**

Joe Brosius and Mr. Niederdeppe asked that the August 20, 2009 minutes reflect that they were absent. Motion by Joe Brosius to approve August 20, 2009 minutes as revised. Second by Rich Woerth. Motion passed unanimously.

**ITEM II – Motion to Adjourn to Executive Session**

N/A

**ITEM II – Request for disability hearing – Steve Baker:**

Mayor Hallman asked Mr. Niederdeppe for concurrence that the disability hearing request from **Steve Baker** was in order. Mr. Niederdeppe responded yes, the paperwork is complete and that it is the prerogative of the board at this time to either hold the public hearing today, or schedule that hearing for an upcoming meeting. Mayor Hallman expressed concern regarding Section 11-A of the adopted Procedures of the Tempe Police and Fire Pension Boards that states ‘unless a claimant requests or agrees otherwise, the board shall commence a hearing upon a disability application in a meeting held within 90 days ....’ . Mayor Hallman asked Mr. Niederdeppe that since the application has already been received, does this meeting constitute the public hearing. Mr. Niederdeppe stated the public hearing has commenced due to the fact that the board has entertained this application within the 90 day timeframe. Lourdes Robertson corrected the date on Form P5 for the date application received by employer – that date should be corrected to August 18, 2009.

Mayor Hallman asked Steve Baker if he knows of any reason why the public hearing should not proceed at this time. Mr. Baker responded that he would be representing himself and holding the hearing now would be acceptable to him.

Mr. Niederdeppe set forth the following standards for a disability retirement. In this case, it is for an accidental disability which is defined as a physical or mental condition that the local board finds totally and permanently prevents an employee from performing a reasonable range of duties within the employee’s job classification and that was incurred in the performance of the employee’s duty. The standard for disability pension is that a member is eligible for an accidental disability pension if the member’s employment is terminated by recent accidental disability as defined. A member shall file an application for a disability pension after the disabling incident within one year after the date the member ceases to be employed. Timely application is a prerequisite to receive a pension.

Mayor Hallman commented that this doesn't require being fired or otherwise asked to leave; it could also include self termination. This application is for a back injury, which the application indicates that is totally and permanently disabling Mr. Baker from performing a reasonable range of duties within Mr. Baker's job classification; these injuries were incurred during the performance of his duties and Mr. Baker chose to terminate his employment with Tempe by reason of disability.

Steve Baker stated that he was injured in June and retired in the DROP program in August 28, 2008 with the classification of Firefighter. Mr. Baker stated that he obtained a part-time job with Boeing as a Firefighter. However, he lost that job due to this back injury. Mr. Baker informed the board he recently filed retirement documents with Boeing who he has worked for over the past 25 years, averaging 20-40 hours per month. Boeing has the same Firefighter qualifications as the City of Tempe. Mr. Baker stated that it was his assumption that he would be able to work until he was eligible for social security. However, that is not physically possible anymore.

Joe Brosius confirmed that Mr. Baker's reason for leaving the City of Tempe was for the DROP Program benefits, not for this back injury. Mr. Baker confirmed that this is true and added that he was being treated for his back injury since the June 7 injury.

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Matt Tripoli entered the meeting at 3:20 p.m.  
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Mr. Baker explained that he was injured doing squats during a workout session, which resulted in an emergency room visit after his shift was over. Mr. Baker was on restricted duty temporarily and eventually resumed regular work with some restrictions. A copy of the independent medical exam has been submitted to the board.

Mayor Hallman commented that Mr. Baker's employment with the City of Tempe was terminated by reason of retirement (DROP), not an injury.

Rich Woerth stated that the question is whether or not the injury that happened during Mr. Baker's employment with Tempe enabled him to stay in the same job profession past his retirement with Tempe. Mayor Hallman asked Mr. Baker if Boeing has a disability retirement option. Mr. Baker responded that the only way to get a disability retirement from Boeing is if you can get a social security disability.

Mayor Hallman commented that this is clearly a physical disability that, were you were still employed, would have totally and permanently prevented you from performing a reasonable range of duties in your class, that was incurred in your performance. The sticking point is going to be that your employment was not terminated by reason of a disability. Mr. Baker commented that he was on light duty at the end of his tenure. Rich Woerth asked if it would matter if Mr. Baker would have terminated employment, for example, 30 days prior to the end of the DROP Program. Mr. Niederdeppe referenced a current court case whereby a Phoenix Firefighter completed the end of the DROP period and applied for a disability pension. The board denied that on the grounds of leaving the workforce by reason of his agreement to leave the workforce in the DROP Program. A Superior Court upheld that decision, and that case is now pending in the Court of Appeals.

Mayor Hallman suggested that this hearing be held in abeyance until that court case has been resolved. Mr. Niederdeppe stated that it could be up to 18 months before a ruling is made on that case.

Mayor Hallman asked Mr. Niederdeppe how it is viewed when a public safety employee is on leave due to a disability and then retires when the DROP Program runs out – is that termination due to a disability? Mr. Niederdeppe responded that the DROP Program contemplates that someone can become disabled while they are in this program. In this particular case, the individual worked until the end of the DROP Program and then left the workforce. From the fund manager's perspective, there may be another issue in this case, depending on how the application or regular retirement came through before the board a year ago.

Mr. Niederdeppe referenced a prior case where the applicant was within one year of filing a disability application. In this instance, the fund manager said that unless there was an application for disability pension at the time the applicant left the workforce, the finality provisions of 847 would trump that disability pension request if the other form of pension hadn't become final. Mr. Niederdeppe asked Mr. Baker if he initially applied for a disability pension or for a regular retirement. Mr. Baker

responded that he applied for a regular retirement. Mayor Hallman commented that this raises the issue of interpretation of the 847 provision. An individual could be on disability leave prior to submitting the application for disability retirement.

Mr. Baker informed the board that the City denied his disability claim, which was unbeknownst to him, prior to retiring from the DROP Program. Initially Dr. Baer found no reason to support a disability retirement for Mr. Baker because he was already retired from the City even though medical reports identified several health issues associated with back problems. After confirming the medical problems, Mr. Baker went to court to seek compensation, which was awarded via Workmen's Compensation.

Mr. Baker added that his first back injury occurred in 2003; reinjured in June, 2007. In 2007, Mr. Baker requested that the City re-open the 2003 workers compensation claim, but that got denied. Rich Woerth asked Mr. Baker if he thought he should ever have been released by his doctor to return to work. Mr. Baker replied that he should not have been released to go back to work; it was Mr. Baker's personal physician (Dr. Field) that made this determination. It was the independent medical examiner the lent his support to the court case, which was in January, 2009.

Rich Woerth stated that he would like more time to look into the findings and reschedule another hearing. Joe Brosius commented that leaving at the end of DROP had nothing to do with Mr. Baker's injury. Mayor Hallman reiterated that the question remains that if an employee leaves in the DROP program without having filed a disability retirement application, how should this be handled.

Mr. Niederdeppe was asked to submit an update on the case law that pertains to this request. Rich Woerth made a motion to continue the hearing until legal counsel can provide additional information. Second by James Foley. Motion passed unanimously.

Motion to adjourn the meeting by Joe Brosius. Second by James Foley. Motion passed unanimously.

**The meeting was adjourned at 4:50 p.m.**