

No. 1-13-2118

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH TAVITAS)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 11 CH 37853
)	
THE RETIREMENT BOARD OF THE)	
FIREMEN’S ANNUITY AND BENEFIT)	
FUND OF CHICAGO,)	Honorable
)	Thomas Allen,
Defendant-Appellee.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 **Held:** In the absence of a valid final action by defendant retirement board, the circuit court’s judgment confirming the denial of plaintiff’s application for duty disability benefits for the injury he suffered in his position as a firefighter is reversed, the Board’s decision is vacated, and the cause is remanded to the Board with directions that it render a final administrative decision.

¶ 2 Defendant, The Retirement Board of the Firemen’s Annuity and Benefit Fund of Chicago (Board), denied the application of plaintiff, Joseph Tavitias, for a duty disability benefit under

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section 6-151 of the Illinois Pension Code (40 ILCS 5/6-151 (West 2010)). Following our holding in *Howe v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 2013 IL App (1st) 122446, we vacate the Board's decision and remand this cause with instructions for the Board to take valid final action by approving a specific written decision by majority affirmative vote.

¶ 3

BACKGROUND

¶ 4 Because we do not reach the merits of the case, we will only briefly summarize the facts. They are largely uncontested and are set forth in the administrative record. On May 2, 2010, while working as an ambulance commander for the Chicago Fire Department, Tavitas was called to a senior citizen facility on a medical emergency call. Upon arrival, Tavitas and the ambulance crew discovered an elderly male weighing approximately 500 pounds apparently suffering from congestive heart failure. Because of the patient's large size, a team of firefighters from a local company assisted in moving the patient at the scene. While moving the patient from his wheelchair to a stretcher for transport in the ambulance, the stretcher became unbalanced and the weight of the stretcher caused Tavitas to suffer pains in his lower back, left knee and groin. Tavitas testified that he injured his knee again when, moments later, he bent to buckle the patient to the stretcher.

¶ 5 Tavitas did not seek medical care for his injuries until he had successfully transported the patient to Illinois Masonic Hospital. Over the course of some time, he underwent various types of treatment which were insufficient to bring him back to full capacity to work as an ambulance commander.

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¶ 6 He applied to the Board for an on-duty disability pension and represented himself at two brief hearings. At the first hearing, Tavitas and the Board's physician testified. After testimony concluded on that day, the Board adopted a motion to recess into closed session.¹ The Board then voted to recess the hearing to accommodate the schedule of a missing witness. The Board reconvened about a month later, on September 21, 2011, and heard the testimony of firefighter/paramedic Barbara Enos, who had assisted with the May 2, 2010 ambulance call. After Enos finished testifying, Board member Anthony Martin made a motion to grant Tavitas's application. The motion was seconded, but the motion lost on a 3 to 4 vote. According to the transcript, immediately after the last member voted, the chairman announced: "Based on the Findings of Fact made by the Trustees, the Trustees have voted to deny you the benefit you have requested. You will be notified by mail of the Findings of Fact and the Board's decision. Okay, good luck to you."

¶ 7 Neither the transcript nor any other portion of the record reveals that, at the time the Board took the vote, that any findings of fact were written down, read aloud, or otherwise placed before the Board to review, discuss, or vote upon. Moreover, the Board never adopted, by majority affirmative vote, any motion disposing of the application.

¶ 8 However, the Board issued a written decision, dated the same day as the second hearing, September 21, 2011. The decision is signed only by the four Board members who voted against the motion to grant the application. The written decision finds that Tavitas "did not present sufficient evidence to meet his burden of proof to show that he is entitled to receive a Duty

¹ As we noted in *Howe*, section 2(a) of the Open Meetings Act (5 ILCS 120/2(a) (West 2010)) required the motion to state the specific statutory exemption under which the Board could meet in closed session. Again, we do not find this apparent violation to be material. See *Howe*, 2013 IL App (1st) 122446, ¶ 13, n.1.

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Disability Benefit pursuant to 40 ILCS 5/6-151 of the Pension Code [sic].” The Board transmitted the decision to Tavitas on September 28, 2011, along with a cover letter stating that the Board had met on September 21, 2011. The Board’s cover letter states that Tavitas would have 35 days from the date of mailing (September 28) to file a complaint for administrative review.

¶ 9 On November 1, 2011, Tavitas filed his complaint for administrative review in the circuit court. He argued that the Board’s findings were against the manifest weight of the evidence and that the injuries he sustained were incurred in and resulting from an act of duty, but he did not raise any issues regarding the method by which the Board adopted its written decision. Tavitas sought a reversal of the Board’s determination. On June 6, 2013, the circuit court issued a summary order affirming the Board’s decision on the merits. This timely appeal followed.

¶ 10 ANALYSIS

¶ 11 In *Howe*, we dismissed an appeal brought by another Chicago firefighter whose disability pension application was rejected by both the Board and the circuit court. We did so for several reasons. First, we noted that the Board had never voted on the written decision which had denied the firefighter’s application, but instead had only voted against an oral motion to grant the pension. After a break of a few weeks, a written decision was prepared which several Board members signed and the Board issued as its final administrative decision. *Howe*, 2013 IL App (1st) 122446, ¶¶ 25-28. We found that the Board’s decision must be in writing, and that by never voting on the actual written decision, it had never rendered a final administrative decision subject to review. *Id.* Second, we found that the Board’s same practice also violated the Open Meetings Act because the seriatim signing of the written decision by several Board members was not done

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pursuant to a vote taken in open, public session. *Id.* See also *Lawrence v. Williams*, 2013 IL App (1st) 130757 (reversing electoral board decision issued by virtue of being signed by a majority of two members outside of an open session). Third, we noted that the Board should not have taken action by voting against a proposition, i.e., by terminating consideration of the disability application and declaring it denied only because more members voted “no” on a motion to grant the application. *Howe*, 2013 IL App (1st) 122446, ¶ 21. We reversed the order affirming the Board’s decision and remanded the case to the Board to enter a final administrative decision in accordance with our opinion. *Id.*, ¶ 35.

¶ 12 The procedural history of this case mirrors what we addressed in *Howe*, with one exception. In *Howe*, the Board’s written decision was dated a few weeks after the Board had voted. *Id.*, ¶ 14. Here, the decision is dated the same day. This is a distinction without a difference, because in both cases, the Board voted immediately after the last witness had testified without ever having written findings of fact before it. In this case, because the hearing was bifurcated over two days, it was theoretically possible that a draft decision could have been prepared based on the first two witnesses’ testimony and circulated for review before the third witness testified. The Board might have found the third witness’s testimony so unhelpful or irrelevant that it did not necessitate any changes to the original draft. However, even assuming that was the case, the transcript makes no reference to any written decision, nor to the Board voting on such a written decision.

¶ 13 Common law principles of parliamentary procedure, and common sense, dictate that a collective body does not take action by voting against a motion – in other words, when there are more “no” than “yes” votes on the motion. A majority of the Board never voted in favor of any

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motion disposing of the application. The majority of “no” votes on the motion to grant the application did not mean the application was denied; that vote merely meant that the main motion was not adopted, thus leaving the status quo in place. The status quo was that the application was pending, awaiting some disposition by an affirmative majority vote.

¶ 14 Thus, we reverse the circuit court’s judgment confirming the decision of the Board and vacate the Board’s decision to deny Tavitias his application for a duty disability benefit, with instructions to the Board to render a valid final action in this cause. See *Rock v. Thompson*, 85 Ill. 2d 410, 438 (1981) (Simon, J., concurring) (“[i]n other words, we told everybody to start over and do it right.”). If, after the Board renders a valid final decision on the merits, the case reaches us again, any party may file a motion asking to adopt the briefs already on file in this case as their briefs in the subsequent appeal.

¶ 15 **CONCLUSION**

¶ 16 The order of the circuit court of Cook County is reversed, the decision by The Retirement Board of the Firemen’s Annuity and Benefit Fund of Chicago is vacated, and this cause is remanded to the Board with instructions that it render a final administrative decision with the principles set forth herein and in *Howe*.

¶ 17 Circuit court judgment reversed; Board decision vacated; cause remanded to the Board for further proceedings, with directions.