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IN THE COURT OF APPEALS OF IOWA

No. 1-448 / 91-0116

STEVE LEADERS,

Plaintiff-Appellee/Cross-Appellant,

vs.

CITY OF COUNCIL BLUFFS,

Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Leo F. Connolly, Judge.

Defendant city appeals a judgment of the district court finding the city had agreed to employ the plaintiff, and plaintiff relied upon these representations in selling his farm to become a firefighter. **REVERSED AND DISMISSED.**

Robert L. O'Brien, Assistant City Attorney, Council Bluffs, for appellant.

Stephen A. Rubes and David E. Richter, Council Bluffs, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant-appellant City of Council Bluffs appeals a district court judgment finding defendant city had agreed to employ plaintiff-appellee Steve Leaders, and Leaders was damaged as a result of the agreement to employ. Plaintiff cross-appeals contending the damage award made by the trial court was not adequate. The decision not to hire was made by the board of trustees on the basis of medical evidence available to it. The board's actions could have been challenged by the filing of a writ of certiorari. None was filed. Therefore, the board's decision is controlling. We reverse the judgment for the plaintiff, finding liability has not been established. Having done so, we need not address the cross-appeal.

The facts are not in serious dispute. Plaintiff, a Pottawattamie County resident, has been a farmer most of his adult life. He applied for a fire fighter's position with defendant city. He was on a certified list, which meant he had passed a civil service examination, a physical agility examination, and oral interviews.

On January 12, 1990, he was told by Fire Chief Burdick three fire fighter positions were open and there were three people on a certified list eligible for the job. The three included plaintiff. Burdick told plaintiff he needed to have a physical examination because his last physical examination was more than 90 days from his current

availability of employment. Plaintiff had an examination on January 23, 1990. On February 16, 1990, Burdick received the doctor's report on a medical examiner's report adopted by the Board of Trustees of the Fire & Police Pension and Retirement Systems of the City of Council Bluffs. The doctor answered the question, "Is the applicant physically fit to perform the duties required by the position?" with a "yes:" However, the radiology report stated "Routine lumbar spine views show narrowing of the disc space at the L3-4 level unchanged from two previous exams. Minimal compression of the superior surface of L2 is also unchanged and degenerative changes are noted generally." The impression was: "Stable appearance since September 27, 1988. Evidence of disc disease at L3-4."

On February 21, 1990, Burdick told plaintiff the results of the first examination and that he had to pass another physical examination. On February 22, 1990, a special meeting of the board directed the second examination.

Plaintiff was sent to an orthopedic surgeon on February 23, 1990. The orthopedic surgeon reported "Patient has some problems with the lumbar spine that fall into the category listed by the NFPA and this was discussed with him. As far as he is concerned and as far as I am concerned, he can have full physical activity at the present time." On February 27, 1990, plaintiff was told

about the results of the second physical examination. On March 7, 1990, Burdick sought clarification from the orthopedic surgeon. In a March 12, 1990 letter, the surgeon responded to the questions about the plaintiff's condition and said "...this condition does pose a moderate risk or liability to a disability plan that provides lifetime compensation and medical care for conditions that might prevent Mr. Leaders from performance of the fire fighting occupation." On March 7, 1990, a third physician had been asked about the orthopedic surgeon's report. On March 8, 1990, he reported, among other things, "There has been some progression of the degenerative change at the L3-4 level since 1984, and probably some slight deterioration in appearance of this level since September 27, 1988." On March 13, the doctor made some correction to his original report.

On March 13, 1990, the board voted unanimously to reject plaintiff from admission to the system.

On March 13, 1990, the plaintiff filed this law suit.

Plaintiff said he considered himself to be employed after he took the first physical and, as a result, he gave up farm leases and sold his machinery.

The case was tried to the court. The trial court found the Board of Trustees of the Fire and Police Pension Retirement Board for the City of Council Bluffs did not have power to reject plaintiff from the retirement system;

the defendant city had made representations to plaintiff from which he would reasonably be expected to cease his farming operation. The trial court found plaintiff was damaged, and computed damages of $48,600 plus interest.

Defendant city contends the district court erred in determining the Board of Trustees of the Council Bluffs Fire Pension Retirement System did not have the power to reject plaintiff as a candidate for employment.

The trial court relied on Downs v. Bd. of Trustees of Police Retirement System of City of Sioux City, 312 N.W.2d 563, 567-68 (Iowa 1981) as support for its holding. In 1989, after the holding in Downs, the language of section 400.8(1) was expanded.

Iowa Code section 400.8(1) now provides in applicable part:

> "...However, the physical examination of applicants for appointment to the positions of . . .fire fighter shall be held under the direction of and as specified by the boards of trustees of the fire or police retirement systems established by section 411.5 and the commission may conduct a medical examination of an applicant after a conditional offer of employment has been made to the applicant. . . ." (language underlined was added in 1989).

The city contends this language evidences an intent by the legislature to vest the board with additional discretion for determining the qualification of applicants. They point out there was evidence that while the plaintiff's condition may not hamper him for current fire fighting, that as a result of the condition he may not

be able to handle the job for the normal time into the future. The obligation to pass on the fitness of candidates is lodged in the board of trustees not the medical board. See Reisner v. Board of Trustees of Dubuque, 203 N.W.2d 812, 814 (Iowa 1973).

Plaintiff's remedy was an appeal by petition for writ of certiorari from the board's action. See Reisner 203 N.W.2d at 814. Benson v. Fort Dodge Police Pension Board of Trustees, 312 N.W.2d 548, 550 (Iowa 1981). The board of trustees is not a party to this action. Its decision cannot be subject to collateral attack, since it is not represented and cannot defend itself. State v. Thompson, 357 N.W.2d 591, 594 (Iowa 1984).

We reverse the judgment and dismiss the case. Costs on appeal are taxed to the plaintiff.

REVERSED AND DISMISSED.