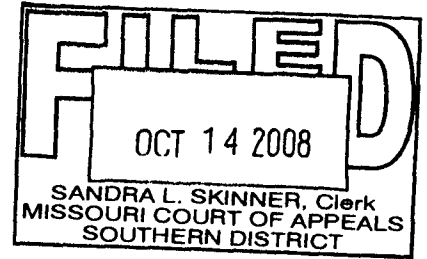


NO. SD29088



MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

Roger Worley,

90251

Appellant,

FILED

vs.

SEP 8 2009

RONALD HOFFMAN, ET AL.,

Thomas F. Simon
CLERK, SUPREME COURT

Respondents.

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SCANNED

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INTRODUCTION AND JURISDICTIONAL STATEMENT

Appellant Roger E. Worley (hereinafter also “Mr. Worley” or “Appellant”) was employed as a police officer by the Police Department of the City of Springfield from his date of hire on April 6, 1992, until his retirement on December 17, 2002. **R. 87.** On or about September 23, 2002, Mr. Worley submitted an application for disability retirement benefits to Respondent Board of Trustees of the Springfield Police and Fire Retirement System (hereinafter also “Board of Trustees” or “Board”). *Id.* Mr. Worley claimed a disabling condition caused by work-related stress and sought benefits for disability incurred in the line of duty. *Id.* The Board of Trustees issued a decision on or about December 12, 2002, finding that Mr. Worley was disabled, but denying his claim for duty-related disability retirement benefits, instead granting him the lesser nonduty-related disability retirement benefits. *Id.*

Mr. Worley timely filed his appeal of the Board of Trustees’ decision. *Id.*; **R. 100.** Hearing Examiner Dennis Budd conducted a contested case hearing on the record, pursuant to Section 2-449 of the Springfield City Code and relevant sections of Mo. Rev. Stat. Chap. 536. **R. 87.** On or about March 8, 2004, Hearing Examiner Budd issued Findings of Fact and Law, and Decision in the matter, favorable to Mr. Worley receiving duty-related disability retirement benefits. **R. 87-98.** The award was made retroactive to the date he was first approved by the Board of Trustees for nonduty-related disability retirement benefits. **R. 98.**

Pursuant to Subsection 2-449(d), the Board of Trustees subsequently rejected Hearing Examiner Budd's decision and issued its own Findings of Fact, Conclusions of Law and Decision. **R. 63; R. 574.** On or about June 3, 2004, Mr. Worley petitioned in Greene County Circuit Court for review of the Board of Trustees' decision, citing irregularities in procedure and errors in applying the law. **R. 1; R. 10.** Mr. Worley alleged due process violations on the part of Attorney Carl Yendes and the Board of Trustees affecting the Board of Trustees' final deliberations on the issue of Mr. Worley's claim for duty-related disability retirement benefits. Thus, Mr. Worley presented that constitutional question at his first available opportunity, that is, in circuit court. It has been properly preserved for presentation before this Court. *See Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 58 (Mo. App. W.D. 1990). An Order and Judgment was entered on or about December 22, 2005, against Mr. Worley on Count III of his petition, finding that the Board of Trustees' decision to deny duty-related disability retirement benefits should stand. On or about March 14, 2008, the Honorable C. David Darnold of the Greene County Circuit Court made a final, full and appealable decision in Respondents' favor and against Mr. Worley concerning all three counts of the petition. **R. 9; R. 1213-1216.** This appeal by Mr. Worley follows.

Greene County Circuit Court lies in the territorial boundaries of the Southern District. **Mo. Rev. Stat. § 477.060 (2004).** Notice of Appeal to this Court was timely filed on April 11, 2008. **R. 1217.** Appeal to this Court is proper under Mo. Rev. Stat. §§ 512.160 and 536.140 (2000).

This appeal involves: a) the question of whether Mr. Worley's due process rights were violated when Attorney Carl Yendes, who represented the City of Springfield in Mr. Worley's administrative hearing also advocated to the final decisionmaker, the Board of Trustees of the Springfield Police and Fire Retirement System, against Mr. Worley's entitlement to duty-related retirement benefits by way of extensive *ex parte* communications, and inordinate and highly biased legal assistance; b) the question of whether the Board of Trustees acted arbitrarily, capriciously, unreasonably or unlawfully in rejecting the administrative hearing examiner's decision to grant duty-related retirement benefits to Mr. Worley based upon the *ex parte* assistance of Attorney Yendes; and c) the question of whether the Board of Trustees used the wrong standard in reviewing and deciding upon Mr. Worley's application for such benefits.

STATEMENT OF FACTS

1. Respondent Board of Trustees of the Springfield Police and Fire Retirement System (hereinafter also "Board of Trustees") has the authority granted to it from the City of Springfield, Missouri, a municipal corporation, (hereinafter also "City") to establish rules and administer the Policeman's and Fireman's Retirement Fund (hereinafter also "Fund"). **R. 1017; R. 1034.**

2. Appellant Roger E. Worley began employment as a police officer for the City of Springfield in April 1992, and as part of the hiring process had to undergo several tests and examinations, including a psychological evaluation. **R. 358; R. 1018; R. 1034.**

3. After working as a police officer for ten years, Mr. Worley applied for disability retirement benefits from the Fund administered by the Board of Trustees pursuant to Section 2-441, *et seq.*, of the Springfield City Code. **R. 573ff; R. 99.**

4. Springfield City Ordinance 2-449 lists three separate entities that are parties to a hearing on claims for disability pensions: 1) the applicant (here, Mr. Worley); 2) the City (acting through the city manager); and 3) the Board of Trustees. The ordinances require the Board of Trustees to decide cases between the City and an applicant, which are listed as separate parties. The Board of Trustee's ordinances provide that the City and the Board of Trustees are not the same entity. **R. 573-575.**

5. Mr. Worley claimed a disabling condition caused by work-related stress and sought benefits for disability incurred in the line of duty. **R. 1018; R. 1034.**

6. In the course of seeking duty-related disability retirement benefits, Mr. Worley was examined by the medical board appointed by the Board of Trustees pursuant to the Pension Plan at Section 2-451. The doctors who examined Mr. Worley, were Dr. Thomas Kuich, Dr. Shawn Rice and Dr. James Neal. **R. 17; R. 1049-1050.**

7. Drs. Kuich, Rice and Neal are all psychiatrists. **R. 91-92.**

8. Mr. Worley was also evaluated by licensed psychologist Dale Halfaker, Ph.D. and licensed counselor Steve Moncher, M.S. The opinions of these two, as well as the opinions of Drs. Kuich, Rice and Neal were all considered, to one extent or another, by Hearing Examiner Budd in his decisionmaking concerning Mr. Worley's case. **R. 91-97.**

9. The Board of Trustees denied Mr. Worley's claim for duty-related disability retirement benefits and granted only nonduty disability retirement benefits. Nonduty-related disability retirement benefits are approximately twenty-five percent of the applicant's income; duty-related disability retirement benefits are approximately sixty-six and two-thirds percent. **R. 573; R. 1018; R. 1034.**

10. Mr. Worley appealed the Board of Trustees' determination that he was not entitled to duty-related disability retirement benefits and a hearing was conducted pursuant to Chapter 536 RSMo, as a contested case on the record. **R. 1018; R. 1034.**

11. At that hearing, Mr. Worley was represented by attorney Steve Meier, and later by attorney Steve Crites. Respondent Board of Trustees was represented by attorney Carl Yendes. **R. 1018-1019; R. 1035.**

Due Process Violation

12. Attorney Yendes litigated Mr. Worley's administrative proceeding as an advocate against Mr. Worley's claim for duty-related retirement benefits, and attempted to persuade the hearing examiner, Dennis Budd, to deny Mr. Worley such benefits. **R. 1019; R. 1035.**

13. Evidence was taken by Hearing Examiner Budd on July 25, 2003, August 29, 2003, September 9, 2003, October 24, 2003, October 31, 2003, and November 14, 2003, including a total of 1,395 pages of testimony transcript. ***Id.***

14. Additionally, Hearing Examiner Budd received 938 pages of exhibits from the parties. The record from the five (5) days of hearings before Hearing Examiner Budd consisted of 2,333 pages. *Id.*

15. On or around March 8, 2004, Hearing Examiner Budd forwarded to the Board of Trustees his twelve-page Findings of Fact and Law, and Decision of the Hearing Examiner. **R. 87-98.**

16. Hearing Examiner Budd determined that Mr. Worley was totally and permanently disabled from performing the occupational duties of police officer by reason of suffering from major depression disorder and anxiety disorder. **R. 98.** He further determined that Mr. Worley had proven by competent and substantial evidence that he suffered the disability as a direct result of his occupational duties. *Id.* Hearing Examiner Budd ordered Respondent Board of Trustees to grant Mr. Worley duty-related disability benefits retroactive to the date he was first approved by the Board of Trustees for nonduty-related disability retirement benefits. *Id.*

17. On March 11, 2004, the Board of Trustees met in closed session to consider Mr. Worley's case. **R. 1133.** Entries of the minutes of that meeting include the following:

YENDES PROVIDED HEARING EXAMINER REPORT/FINDINGS REGARD (*sic*)
ROGER WORLEY'S DUTY DISABILITY CLAIM.

MOTION HALL 2ND KOENEMAN TO TABLE WORLEY ISSUE ALLOWING
BOARD MEMBERS REVIEW OF HEARING EXAMINER REPORT/FINDINGS.

VOTE ALL YES.

R. 1133-1134.

18. Attorney Yendes provided his “Report / Findings” to the Board of Trustees which contained his *ex parte* creditability determinations and legal arguments. **Appendix 181-182.**

19. On April 8, 2004, the Board of Trustees met again. Present were Attorney Yendes and Trustees Hall, Gomez, Whisler, Fantauzzi, Brown, Hoffman, Rahmeyer and Larbey. **R. 1020; R. 1035; R. 1135.**

20. The Board of Trustees voted to go into closed session to discuss and deliberate on Mr. Worley’s case. Attorney Yendes remained with the Board of Trustees in closed session. Attorney Yendes met privately in closed session with the Board of Trustees on April 8, 2004, and presented argument to the Board of Trustees on Mr. Worley’s case. **R. 1124-1126; R. 1130-1131; R. 1135.**

21. Neither Mr. Worley nor his attorney were allowed to respond to Attorney Yendes’s arguments on the creditability of witnesses or the law, nor were they allowed to be present or to participate in the Board of Trustees’ deliberations and decision in the closed session. **R. 1124-1126; R. 1130-1131.**

22. The Board of Trustees heard additional evidence concerning Mr. Worley's claim that was not in the record, through Attorney Yendes. **R. 1124-1126; R. 1130-1132; R. 1133-1134; R. 1135-1136.**

23. The Board of Trustees deliberated with Attorney Yendes on Mr. Worley's claim for about twenty minutes. **App. 86; App. 91.**

24. Trustees Hall, Gomez, Whisler, Fantauzzi, Brown, Hoffman, Rahmeyer and Larbey voted, after hearing argument from Attorney Yendes, to deny Mr. Worley duty-related disability retirement benefits. **R. 1124-1126; R. 1130-1132; R. 1135.**

25. Findings of fact and conclusions of law were issued by the Board of Trustees on May 13, 2004. **R. 63-86.** The Board of Trustees' Findings of Fact, Conclusions of Law and Decision contain the exact words found in Attorney Yendes's Report / Findings, that was submitted to the Board of Trustees *ex parte* on March 11, 2004. **R. 1124-1126; R. 1130-1132.**

26. The Board of Trustees further claims that Attorney Yendes's Report / Findings was protected as an attorney-client communication. **App. 181.**

27. Subsection 2-449(d) of the City of Springfield Policemen's and Firemen's Pension Plan ordinances (hereinafter also "Pension Plan") provides:

Board action after formal hearing. The [Board of Trustees], upon receipt of the decision of the hearing examiner, shall, upon review of the record made before the hearing examiner, accept, modify or reject the hearing examiner's decision; however, if the

[Board of Trustees] rejects or modifies the decision of the hearing examiner, the [Board of Trustees] shall be required to have reasons based upon the evidence for the modification or rejection and shall state such reasons in its decision. A copy of the decision of the [Board of Trustees] shall be filed with the secretary of the [Board of Trustees] and mailed to the applicant and the city manager or city attorney. The [Board of Trustees] shall not hear or take any new evidence when reviewing the decision of the hearing examiner.

R. 574.

28. Pursuant to Section 536.100 RSMo, on June 3, 2004, Mr. Worley timely filed his petition, in three counts, for judicial review of the May 13, 2004 Board of Trustees decision. **R. 1; R. 10; R. 1017; R. 1033.**

29. A Second Amended Petition, in three counts, was filed on March 23, 2005. The three counts were: Count I – Unconstitutional Agency Action; Count II – Application for Relief Denied Pending the Final Disposition of the Case; and Count III – Review of Decision by the Board of Trustees – May 13, 2004. **R. 1017; R. 1023; R. 1026; R. 1028.**

The Legal Standard for “Duty-Related”

30. Springfield City Code Section 2-451 provides that: “There shall be three doctors appointed by the Board of Trustees to be known as the Medical Board. Such Board shall make all physical examinations required under the division. . . .” **R. 575.**

31. Springfield City Code Section 2-441 provides that: “Medical Board means a board of three medical doctors, appointed by the Board of Trustees as provided in this division.” **R. 570.**

32. The Medical Board was convened consisting of Dr. James Neal, Dr. Shawn Rice and Dr. Thomas Kuich. A one-page form was submitted to each of these doctors. **R. 17; r. 1049-1050.**

33. Based upon Section 2-474(a) of the Springfield City Code, Mr. Worley was eligible in December 2002 for duty-related disability benefits because of the recommendation of two out of three physicians from the Medical Board. **R. 87-88.**

34. On March 8, 2004, Hearing Officer Budd issued his twelve-page decision finding in favor of Mr. Worley. The hearing officer recognized that the term “direct result of occupational duties” is clearly defined under Missouri case law, and that the existence of a pre-existing condition (or its absence) is not the issue. **R. 96-97; R. 98.**

35. Hearing Officer Budd recognized that it was irrelevant whether Mr. Worley may have had a pre-existing psychological condition. He stated:

Even if the evidence were to be construed to support a finding of that Mr. Worley had pre-existing, undiagnosed condition such as cognitive disability or obsessive-compulsive traits, the Hearing Examiner would nonetheless find in applicant’s favor on the issue of duty disability. The fact that the City granted permanent employee status to applicant only after he completed rigorous pre-employment screening, a lengthy training process

and probationary status, all on terms and conditions established by the City, is decisive. Applicant then carried out his duties in capable and at times exemplary manner for several years and would likely still be a valuable asset to the Police Department but for the unfortunate emergence of psychological disabilities. All the relevant expert testimony support a finding that applicant's depression and anxiety disorders emerged only after several years of employment as a direct result of job-related stress, the source of which has been set forth in substantial detail in these findings. Applying the Mitchell standard, supra, to these facts, the decision of the Hearing Examiner would still be that applicant has met his burden of proof by showing that he became disable as 'the direct result of occupational duties,' by reason of having shown that his 'pre-existing condition' was aggravated as a direct result of performing, and attempting to perform, his sworn duties as a police officer.

R. 96-97.

DR. SHAWN RICE:

36. Dr. Rice performed a formal mental status examination of Mr. Worley and concluded that he was disabled, but that the disability was not caused by his job duties. **R. 93.**

37. Dr. Rice testified that there was nothing remarkable in his family and social relationships outside of work that would contribute to mental illness. **R. 253-254.**

38. Dr. Rice's diagnosis of Mr. Worley: "major depressive disorder, single episode,

severe,” and that he meets the criteria for “generalized anxiety disorder.” **R. 262-263.**

39. Dr. Rice opined that Mr. Worley, with neuropsychic testing, might be found to have cognitive disorder. **R. 263; R. 283.**

40. Dr. Rice stated in deposition that he has no doubt that Mr. Worley’s depression and anxiety are secondary to work-related incidents. **R. 284.**

41. Dr. Rice further testified that it was “absolutely” his opinion, to a “reasonable degree of medical certainty” that Mr. Worley’s duties as a police officer caused him stress, anxiety and depression. **R. 326; R.330.**

42. Dr. Rice believes that being a police officer and performing the duties of a police officer caused Mr. Worley pain, suffering, depression and anxiety. **R. 291; R. 328.**

42. According to Dr. Rice’s deposition testimony, he received a letter from Attorney Yendes requesting the doctor’s opinion as to whether Mr. Worley’s disability was a direct result of occupational duties “as opposed to other factors or causes.” The letter included no definition of “direct result of occupational duties.” **R. 321-322; R. 323-324.**

43. Dr. Rice believed the phrase “direct result of occupational duties” as found in the letter from Attorney Yendes meant that the occupational duties were the only cause, without any other factors. **R. 324.**

44. Dr. Rice testified “I believe that becoming a police officer allowed this problem to occur. It was already there, it’s just that he was thrown in this situation that was – came to light, due to the job that he has got.” **R. 97.**

43. Dr. Rice testified that Mr. Worley was disabled because of:

... major depressive disorder, single episode, severe, that's the depression. I do believe that this depression is there, I believe it's severe and I believe that the depression is that he meets criteria for that, and I also believe he meets criteria for generalized anxiety disorder with the worrying and the obsessing about work and the muscle tension and symptoms of anxiety and panic that he is having.

R. 93.

44. Dr. Rice again testified:

And I also have no doubt in my mind that the depression and anxiety, having not had those until he was subjected to those work-related incidents, that I have no doubt in my mind that the depression and anxiety are secondary to that. And that the problems can interfere with his ability to perform his work.

R. 284.

45. Dr. Rice continued to testify, "But I would have to say in this case though, back on the record, that I do believe that his anxiety and depression is from this situation of being a police officer, because there is no family history and he wasn't depressed before." **R. 291.**

46. Dr. Rice again testified:

Right, and there is no family history. If he had had a family history of depression, I would have thought – and depressions beforehand, but he didn't. So I would have to say that his depression and anxiety were, I would think, caused by the stress he was

under, would it be somebody else that didn't have – some people would not be depressed, no matter what.

R. 291.

DR. DALE HALFAKER:

47. Dr. Halfaker, who is not a medical doctor, concluded in his written evaluation of Mr. Worley that: "It is my impression that his major depression and anxiety disorder did result from the stress related to his work." **R. 97.**

48. Dr. Halfaker testified regarding his understanding of the requirement for duty related disability:

Q. That's a workers' compensation true?

A. Correct.

Q. Not the definition for the pension plan, are you aware of that?

A. Correct. I don't know what the definition for the pension plan is.

R. 190.

49. Again, Dr. Halfaker testified:

Q. You're not telling us that his work did not contribute to the disability?

A. Correct.

Q. You're just saying that the contribution was not extraordinary or unusual?

A. Yes.

R. 192.

50. Dr. Halfaker further testified that he had no evidence of any dysfunction prior to Worley's experiences at work:

Q. When did that dysfunction commence in terms of his employment history at the City of Springfield Police Department?

A. Because of the nature and pathology that I've identified, I think that the dysfunction would have been present prior to his employment, but probably had not really manifested itself until probably around 1995 . . .

Q. But you are not aware of – sitting here today, any evidence of that pre-existing prior to 1995, is that true?

A. That would be correct.

R. 224.

51. Dr. Halfaker went on to testify:

Q. Do you know what year or what date Roger [Worley] began to feel unsure about how to handle his police duties?

A. I would say my opinion would be similar to what I expressed before, that from his comments to me, and beginning in 1995 with the incident in which he stopped an individual driving, I think it was a Jeep, in which the Chief wrote a letter to the family, that Mr. Worley felt undermined at that point. And in my report, under "case history," I say "this angered this officer because he was trained to act in this manner and does not know how to deal

with not being supported for acting in accordance with his training.” And that around that time we begin to see the seeds of some difficulty making decisions and figuring out the best course of action.

R. 229.

52. Dr. Halfaker again makes it clear that there was no sign of problems until after several years of employment:

I would say in my estimation when we talked about around the 1995 period of time when he began to deal with what he felt were conflicting messages of how he should behave with regard to Standard Operating Guidelines and dealing with the public and who was friends of the Chief or who weren't, that those were – that was the environment that then caused the personality disorder to be manifested or seen.

R. 232.

DR. JAMES NEAL:

53. Psychiatrist Dr. James Neal performed a clinical mental status examination of Mr. Worley and rendered an opinion that he was disabled and “that the duties and the environment of work appeared to have resulted in the disability.” **R. 92.**

54. Dr. Neal provided the City of Springfield with a completed disability claim form on November 13, 2002. In that form, Dr. Neal indicated to the City that Mr. Worley was disabled and that based upon his examination of Mr. Worley, it was Dr. Neal's opinion that the disability was a result of occupational duties. **R. 493.**

55. In November 2002, Dr. Neal provided a report stating that Mr. Worley was completely disabled for police work “since the cover letter I received with the associated materials clearly states that a police officer must be able to perform all of the job duties and it appears to me that he cannot perform all of the job duties and it does appear that this has developed due to the occupational setting, that I believe that Mr. Worley is disabled and that it is a duty-related disability.” **R. 495.**

56. Dr. Neal testified that there was no evidence of any problem Mr. Worley had functioning either in the work place or outside of the work place prior to stress-related symptoms from work.

A. I rendered the opinions that the duties and the environment of work appeared to have resulted in the disability.

Q. And was that opinion also to a reasonable degree of medical certainty?

A. Yes.

R. 424.

57. In Dr. Neal’s second deposition, he testified:

Q. Were there any tests or any other diagnostic-type things you would have liked to have performed in connection with this evaluation that would have helped you in reaching your conclusions?

A. Generally, you think about doing diagnostic testing if you are looking for specific psychiatric illness. And that’s not what I was asked to do.

Q. Is there any course of treatment that you would recommend for Mr. Worley's condition?

A. I think that would depend on whether I found a specific psychiatric illness to treat, and I don't believe I found one.

Q. So you don't think he has a psychiatric illness?

A. It is possible to have a condition which is a circumstance of environment and situations and not necessarily need a specific kind of treatment. Generally, if somebody is being overwhelmed by their environment, counseling may be of some benefit. But, again, that is certainly within the purview of the Police Fire Board to assist him with and/or his personal physician. I was asked to do an independent evaluation to look at whether he did or did not meet the disability criteria, whether or not he could fulfill all of the components of the job description which were sent to me and that's what I did.

R. 507-508.

DR. TOM KUICH:

58. Dr. Tom Kuich completed the requisite one-page form and submitted it on November 13, 2002, to the Board. On that form, Dr. Kuich indicated that he had examined applicant and found him to be disabled, and based on his examination, he was of the opinion that Mr. Worley's disability was "the result occupational duties." **R. 92.**

STEVE MONCHER, MS:

59. Social worker Steve Moncher assessed Mr. Worley and administered certain psychological tests. His opinion was that Mr. Worley “. . . is not an individual who is presenting with a cognitive deficit. Mr. Worley presents as someone with a good degree of cognitive flexibility. . . . No psychopathology was noted in the responses.” R. 95.

The Board of Trustees' Decision

60. On May 13, 2004, Board Chairman Ronald Hoffman signed the Board's decision described as Findings of Fact, Conclusions of Law and Decision of the Board of Trustees. The first two (2) pages of that document set forth the alleged reasoning of the Board for reversing Hearing Officer Budd's decision. The Board cites three (3) reasons:

- a. First, the Board believed that the hearing officer did not give sufficient weight to the testimony Drs. Rice and Halfaker, who stated that the latent pre-existing conditions (cognitive disorder and obsessive compulsive disorder) made Petitioner's disability non-duty related. Nonetheless, Drs. Rice and Halfaker testified repeatedly that Mr. Worley suffered from anxiety and depression which were caused by conditions at work. Drs. Rice and Halfaker testified that they believed Worley had a latent pre-existing condition that reacted with the stresses of work and both contributed to the total disability after years of service.
- b. Secondly, the Board's decision states that the hearing officer assigned too much weight to Dr. Neal who testified that Worley's condition was a direct result of occupational duties. The Board claims that this evidence should not have carried any

weight because Dr. Neal failed to diagnose a specific psychiatric condition in Worley. However, it is not a requirement under the rules governing the retirement board for the claimant to prove that he suffers from a medically diagnosable condition, only that he cannot perform the duties as required of a Springfield police officer. The form used by the Board and given to doctors selected by them does not even contain a blank to fill in for a “diagnosis.”

c. Thirdly, the Board argues that the hearing officer erred because he improperly shifted the burden of proof: “Finally, the hearing officer improperly imposed a burden of proof upon the City in its response to Mr. Worley’s claim to produce and document a specific pre-existing condition to rebut his claim of duty related causation.”

R. 64.

61. The Board of Trustees’ decision cites no evidence showing that Mr. Worley suffered from any disability prior to the exposure to stress as a police officer. In its decision, it never argued or denied that all the medical evidence indicated that occupational duties caused Mr. Worley’s disabling depression and anxiety. The Board of Trustees essentially concludes that evidence of a latent pre-existing condition (even though non-disabling) precludes an award for duty-related disability. **R. 64.**

STANDARD OF REVIEW

The standard of review for Point I, addressing the circuit court's judgment against Appellant Roger E. Worley on his Second Amended Petition for Review Under Chapter 536 RSMo, alleging due process violations in the proceedings before the Board of Trustees, is set forth in *State of Missouri v. Laplante*, 148 S.W.3d 347 (Mo. App. S.D. 2004). This Court may "hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency, not shown in the record" and review whether the agency drew and made proper legal conclusions therefrom. Mo. Rev. Stat. § 536.140.4 (2000); *Junior College District of St. Louis v. City of St. Louis*, 149 S.W.3d 442, 446 (Mo. 2004). However, appellate courts accord no deference to the circuit court's declarations or applications of law; questions of law are reserved for the appellate court's independent review. *Laplante*, 148 S.W.3d at 348-349.

As to Points II and III of this appeal, following judicial review of an agency's administrative action in a contested case the appellate court reviews the decision of the agency, not the circuit court, and reviews questions of law *de novo*. *TAP Pharmaceutical Products Inc. v. State Bd. of Pharmacy*, 238 S.W.3d 140, 141-142 (Mo. banc 2007); *Missouri Coalition for the Environment v. Herrmann*, 142 S.W.3d 700, 701 (Mo. banc 2004).

Point II alleges that the board erroneously rejected the hearing examiner's decision in favor of Mr. Worley's claim for duty-related disability retirement benefits, and issued a

decision based on evidence outside the record and without considering the whole record, with the resulting decision being unreasonable, unlawful and unsupported by competent and substantial evidence upon the whole record. Mo. Rev. Stat. § 536.140.3 (2005) provides that when the agency decision under review “does not involve the exercise by the agency of administrative discretion in the light of the facts, but involves only the application by the agency of the law to the facts,” the court may conduct *de novo* review of that decision. In so doing, the court is entitled to weigh the evidence and determine the facts for itself. **Mo. Rev. Stat. § 536.140.4.** Since this appeal, at Point II, alleges irregularities in procedure and unfairness by the Board of Trustees, this Court may hear and consider evidence concerning those allegations not shown in the record. *Id.*

Point III alleges that the Board of Trustees misapplied the law by relying on the wrong legal standard for causation and pre-existing conditions. The same standard of review applies here as in Point II, in that, where the Board of Trustees has no discretion in light of the facts presented, this Court is entitled to make an independent determination as to the proper application of the law to those facts. **Mo. Rev. Stat. § 536.140.4; *Chipperfield v. Missouri Air Conservation Comm’n*, 229 S.W.3d 226, 234 (Mo. App. S.D. 2007) (citing *Edwards v. Mo. State Bd. of Chiropractic Examiners*, 85 S.W.3d 10, 19 (Mo. App. W.D. 2002)).** *De novo* review is proper because “[t]his case does not involve the exercise by the Board of Trustees of any administrative discretion in light of the facts. After the facts are determined, [Mr. Worley] either is or is not entitled to the increased pension benefits as a

matter of law.” *Bergman v. Board of Trustees of Firemen’s Retirement System of St. Louis*, 425 S.W.2d 143, 146-147 (Mo. 1968). This standard of review applies to cases where, as here, “the appellant challenges the construction of law or legal standard applied to it by an administrative agency.” *Evangelical Retirement Homes of Greater St. Louis, Inc. v. State Tax Comm’n of Missouri*, 669 S.W.2d 548, 553 (Mo. 1984) (citing *Missouri Church of Scientology v. State Tax Commission*, 560 S.W.2d 837, 838 (Mo. banc 1977)). “The issue [of] whether a disability must be solely or only partially caused by an injury suffered while on duty in order to qualify for a duty disability pension is an issue of law, involving interpretation of the relevant ordinance.” *State ex rel. Nance v. Board of Trustees for Firefighters’ Retirement System of Kansas City, Mo.*, 961 S.W.2d 90, 91 (Mo. App. W.D. 1998). As such, the reviewing court may “resolve factual issues where it has been successfully urged by appellant that the legal standard applied by the agency was incorrect.” *Evangelical Retirement Homes*, 669 S.W.2d at 553 (citing *Bergman v. Board of Trustees of Firemen’s Retirement System*, 425 S.W.2d 143, 147 (Mo. 1968) and *Guntli v. McLeod*, 646 S.W.2d 899, 901 (Mo. App. E.D. 1983); also, *Bank of Crestwood v. Gravois Bank*, 616 S.W.2d 505, 518 (Mo. banc 1981) (Rendlen, J., dissenting)).

POINTS RELIED ON

- I. The circuit court erred in entering judgment against Appellant Roger E. Worley on Count I of his Second Amended Petition for Review Under Chapter 536 RSMo, which sought relief for Respondents’ violation of Mr. Worley’s due

process rights as guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 1, § 10 of the Missouri Constitution, because the undisputed evidence proved a due process violation, in that the attorney who advocated for the City of Springfield in an administrative hearing against Mr. Worley's entitlement to duty-related retirement benefits, subsequently entered into extensive *ex parte* communications with the final decisionmaker, *i.e.*, the Board of Trustees of the Springfield Police and Fire Retirement System, giving it evidence outside the record, with no opportunity for Mr. Worley or his attorney to be present during those communications so as to allow for fair and impartial decisionmaking.

Camero v. United States, 375 F.2d 777 (Ct. Cl. 1967)

Cochran v. Board of Educ. of Mexico School Dist. No. 59, 815 S.W.2d 55 (Mo.App.W.D. 1991)

Hall v. Jennings School District, 133 S.W.3d 112 (Mo. App. E.D. 2004)

Mo. Const. art. 1, § 14

Mo. Rev. Stat. § 536.080 (2000)

U.S. Const. Amend. 5

U.S. Const. Amend. 14

II. The Board of Trustees of the Springfield Police and Fire Retirement System

erred in rejecting the hearing examiner's award of duty-related disability retirement benefits to Mr. Worley, because the Board of Trustees' decision was unreasonable, unlawful and unsupported by competent and substantial evidence upon the whole record, which is reviewable under Mo. Rev. Stat. § 536.140 (2005), in that the Board of Trustees based its decision on evidence outside the record failed to review the record from the administrative hearing as required under Mo. Rev. Stat. § 536.080 (2000) and under Section 2-449 of the Policemen's and Firemen's Pension Plan ordinances, resulting in the Board of Trustees denying Mr. Worley benefits to which he was and is entitled under the Policemen's and Firemen's Pension Plan.

Clark v. Fag Bearings Corp., 134 S.W.3d 730 (Mo. App. S.D. 2004)

Knapp v. Missouri Local Government Employees Retirement System, 738 S.W.2d 903 (Mo. App. W.D. 1987)

Mo. Rev. Stat. § 536.140 (2005)

Mo. Rev. Stat. § 536.080 (2000)

Springfield City Code (Mo.) § 2-449 (2001)

III. The Board of Trustees of the Springfield Police and Fire Retirement System
erred in rejecting the hearing examiner's award of duty-related disability

retirement benefits to Mr. Worley, because the Board of Trustees erroneously applied the law to the evidence, allowing review of the agency decision as provided in Mo. Rev. Stat. § 536.140 (2005), in that the Board of Trustees misconstrued and misapplied the applicable causation and pre-existing condition standard found in the Policemen's and Firemen's Pension Plan, Springfield City Code (Mo.) § 2-474, which specifically allows that "[a]ny employee of the police department . . . who becomes disabled *as the direct result* of occupational duties, including but not limited to accidents and or hazards peculiar to the employment, shall be entitled to a duty disability pension," (emphasis added) irrespective of any pre-existing condition, where disability was found by all medical examiners to have directly resulted from occupational duties.

Hay v. Schwartz, 932 S.W.2d 295 (Mo. App. W.D. 1998)

Mitchell v. City of Springfield, 410 S.W.2d 585 (Mo. App. S.D. 1966)

State ex rel. Nance v. Board of Trustees for Firefighters' Retirement System of Kansas City, Mo., 961 S.W.2d 90 (Mo. App. W.D. 1998)

Mo. Rev. Stat. § 536.140 (2005)

Mo. Rev. Stat. § 536.080 (2000)

Springfield City Code (Mo.) § 2-474 (2002).

ARGUMENT

I. The circuit court erred in entering judgment against Appellant Roger E. Worley on Count I of his Second Amended Petition for Review Under Chapter 536 RSMo, which sought relief for Respondents' violation of Mr. Worley's due process rights as guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 1, § 10 of the Missouri Constitution, because the undisputed evidence proved a due process violation, in that the attorney who advocated for the City of Springfield in an administrative hearing against Mr. Worley's entitlement to duty-related retirement benefits, subsequently entered into extensive *ex parte* communications with the final decisionmaker, *i.e.*, the Board of Trustees of the Springfield Police and Fire Retirement System, giving it evidence outside the record, with no opportunity for Mr. Worley or his attorney to be present during those communications so as to allow for fair and impartial decisionmaking.

Overview – Point I

Appellant Roger E. Worley, in this point on appeal, asks this Court to review the circuit court's decision in favor of the Board of Trustees of the Springfield Police and Fire Retirement System on Count III of Mr. Worley's Second Amended Petition. Mr. Worley herein sets forth reasons for reversing the circuit court, because his constitutional due process rights were violated during the Board of Trustees' deliberations. "The procedural due process requirement of fair trials by fair tribunals applies to administrative agencies acting in an adjudicative capacity." *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d

52, 59 (Mo. App. W.D. 1990) (citing *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). This question concerning constitutional violations was brought at the first available opportunity and is properly before this Court. The circuit court, by relying too heavily upon *Cochran v. Board of Educ. of Mexico School Dist. No. 59*, 815 S.W.2d 55 (Mo. App. W.D. 1991), overextended the *Cochran* court's findings and holding to the derogation of Mr. Worley's due process rights.

Specifically, Mr. Worley urges this Court to review the conduct of the Board of Trustees and Attorney Carl Yendes, the attorney who advocated in behalf of the City of Springfield, and against Mr. Worley, in an administrative hearing concerning Mr. Worley's entitlement to duty-related retirement benefits. Attorney Yendes, by *ex parte* communications with the final decisionmaker, the Board of Trustees, persuaded said board to reject the hearing examiner's decision and adopt his own opinions and creditability determinations. Attorney Yendes gave the Board of Trustees incomplete information on the one hand, and supplemental, extraneous materials on the other. He provided the Board of Trustees with his 22-page report / findings (also "brief") , which was not part of the record on review, that the Board of Trustees adopted, essentially unchanged, as its findings and decision in the matter.

The Board of Trustees decision (the findings of Attorney Yendes) completely disregards certain on-the-record evidence, including evaluations by an appointed medical professional that opined that Mr. Worley's disability was the result of his duties as a police

officer. While Attorney Yendes took the opportunity to unilaterally advocate for the City to the Board of Trustees, against both the duty-related disability retirement benefits for Mr. Worley, and against the findings and award of the hearing examiner, Mr. Worley and his attorney had no opportunity for rebuttal. The Board of Trustees never saw the post-trial brief prepared by Mr. Worley.

Mr. Worley, in this appeal, urges strongly that these actions by the Board of Trustees and Attorney Yendes constitute an egregious violation of due process of law, resulting in denial of significant benefits to which he is duly entitled. The circuit court upheld the decision by the Board of Trustees that was arbitrary, capricious, unauthorized by law and was made upon unlawful procedure and without a fair trial.

Attorney Yendes's *ex parte* contact with the Board of Trustees
included in-person advocacy and presentation of evidence outside the record.

An *ex parte* contact is a contact “done or made at the instance and for the benefit of one party only, and without notice to, or argument by any person adversely interested. . . .” ***Black's Law Dictionary* 616 (Bryan A. Garner ed., 8th ed, West 2004).** The Board of Trustees admits that Attorney Yendes was present in its closed session held to deliberate Mr. Worley's claim for duty-related disability retirement benefits. Respondents also admit that Mr. Worley and his attorney were excluded from that closed session. The Board of Trustees further claims that Attorney Yendes's Report / Findings, given to it by Attorney Yendes, was protected as an attorney-client communication. Trustee David Hall admits that

prior to voting on Mr. Worley's case, the Board of Trustees was provided with the proposed findings of fact and conclusions of law prepared by Attorney Yendes. The Board of Trustees does not dispute that it deliberated on Mr. Worley's claim for approximately twenty minutes.

Though Mr. Worley submitted a brief as requested by Hearing Examiner Budd, this was never part of the record submitted to the Board of Trustees for review in its deliberations concerning Mr. Worley. Attorney Yendes's Report / Findings was submitted to the Board of Trustees *ex parte*, then, with editing only to couch it as findings of fact, conclusions of law and a decision, it appears as a mirror image of Attorney Yendes's Report / Findings – Findings of Fact, Conclusions of Law and Decision of the Board of Trustees. The Board of Trustees was provided with Attorney Yendes's Report / Findings, but was not provided with the post-hearing brief of Mr. Worley. Mr. Worley's brief appears nowhere in the record for the Board of Trustees' review.

The Board of Trustees apparently does not dispute that Attorney Yendes's creditability determinations and legal conclusions were adopted verbatim in its 25-page decision without the Board of Trustees having reviewed the record containing transcript and exhibits of 2,000 pages. The *ex parte* contact in Mr. Worley's case appears to be the only basis upon which the Board of Trustees' decision rests.

Respondents cannot suggest that Attorney Yendes's post-trial brief that contains his proposed findings of fact and conclusions of law was actually part of the record. The Board of Trustees has repeatedly denied this. Attorney Yendes's Report / Findings is not

mentioned in the Board of Trustees' decision. The record filed by Respondents in the circuit court does not contain Attorney Yendes's Report / Findings. Mr. Worley has submitted numerous interrogatories to Respondents. In the first and second set of interrogatories, Mr. Worley sought for Respondents to identify the documents that were reviewed as part of the record. Attorney Yendes's brief was not mentioned. The circuit court ordered submission of all materials submitted to the Board of Trustees by Attorney Yendes whether they were privileged or not. Two members of the Board of Trustees responded that Attorney Yendes's brief was not given to them. The Board of Trustee went outside the record to gain additional opinions, evidence and facts and used this additional information obtained through undocumented discussions and contacts with Attorney Yendes as the basis of its decision to deny duty-related disability benefits to Mr. Worley.

[O]ne of the fundamental premises inherent in the concept of an adversary hearing, particularly if it is the evidentiary type, is that neither adversary is permitted to engage in an ex parte communication concerning the merits of the case with those responsible for the decision. . . . It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. To allow such activity would be to render the hearing virtually meaningless. We are of the opinion that due process forbids it.

***Camero v. United States*, 375 F.2d 777, 780-781 (1967).**

Both Attorney Crites and Mr. Worley saw Attorney Yendes participating with the

Board of Trustees in its deliberations. The Affidavits of Mr. Worley and Attorney Crites are not offered to this Court as a basis for determining exactly what was said by Attorney Yendes during deliberations on Mr. Worley's case. Whatever oral information Attorney Yendes presented, we now know what he presented in writing to the Board of Trustees: his 22-page brief/proposed findings. The affidavits are submitted to this Court to show that witnesses saw Attorney Yendes orally communicating with the Board of Trustees for approximately 20 minutes during deliberations in Mr. Worley's case. Then, within seconds of finishing his communications with the Board of Trustees, Attorney Yendes left the meeting and announced to Mr. Worley and his counsel that the Board of Trustees had deliberated and voted to reject Hearing Examiner Budd's decision and instead voted to rule for his client. The affidavits also show that the 2,300 page record was not visible anywhere in the room prior to or during the Board of Trustees' deliberations. Respondents do not dispute the facts contained in these two (2) affidavits.

Attorney Yendes influenced the Board of Trustees

It is undisputed that Yendes was present during deliberations and that he acted as an advocate for the City. Naturally enough his proposed findings only included those facts and arguments that were favorable to the City's position that Mr. Worley should be denied duty-related disability benefits. Attorney Yendes argued successfully to the Board of Trustees as an advocate for the City that it should deny Mr. Worley those benefits. By presenting his brief/proposed findings to the Board of Trustees, Attorney Yendes evidenced his intent to sway the Board of Trustees prior to it reviewing or hearing any evidence. Attorney Yendes's

communication with the Board of Trustees was dispositive of the outcome.

For example, Attorney Yendes, in his proposed findings, argues for a definition of duty-related disability and causation that differs significantly from the definition used by Hearing Examiner Budd. Hearing Examiner Budd went to great lengths in his decision to analyze the legal framework for causation in a case such as Mr. Worley's. Hearing Examiner Budd cited numerous cases that have defined causation in a duty-related disability case under Missouri law. Attorney Yendes, in his proposed findings, uses a different and novel definition of causation. Attorney Yendes's definition was adopted verbatim by the Board of Trustees. Nowhere in its decision does it discuss why it adopted Attorney Yendes's definition of causation as opposed to the definition favorable to Mr. Worley. There is no indication in the record that the Board of Trustees ever considered the definition of causation used by Hearing Examiner Budd. The definition of causation used by the Board of Trustees was dispositive of Mr. Worley's case. Therefore, based upon the record it is clear that Attorney Yendes deliberated with the Board of Trustees in such a way as to affect the outcome.

The Cochran Case

Respondents argue that *Cochran v. Board of Educ. of Mexico School Dist. No. 59*, 815 S.W.2d 55 (Mo.App.W.D. 1991) establishes that Attorney Yendes could participate with the Board of Trustees in its deliberations. This is where the circuit court erred.

In *Cochran*, the school board's attorney argued the case against a teacher on behalf

of the school system, and later attended the school board's closed session while it deliberated on the teacher's case. During the hearing, another principal in the attorney's firm acted as legal advisor to the school board, as the school board heard the live testimony and received the evidence. The attorney that argued the case at the hearing, attended the school board's closed session while they deliberated the matter. This attorney attested via affidavit as to his involvement, which was limited to an advisory role. He helped draft the opinions for the majority and minority, and was excused from the meeting while the school board discussed the drafts and made revisions. *Id.* at 59. Probably the most important finding in *Cochran* relates to the determination that the attorney for the school board was "merely present to provide technical assistance to the board, to help them reduce their decision to writing, and to inform them of any legal requirements." *Id.* at 61. The *Cochran* court noted that the attorney for the school board did not comment on the evidence or express any opinions. *Id.* The attorney in *Cochran* informed the school board, which had personally heard the evidence, that they could only consider evidence presented at the hearing and could not consider matters outside of the evidence presented at the hearing. *Id.* In *Cochran*, there was no indication that the attorney actively participated in the actual decisionmaking of the school board or influenced the outcome of its deliberations. *Id.*

One case referred to in *Cochran* was offered by Mr. Cochran to support his claim of a due process violation, and it is more fitting in this case, though from another circuit. *Board of Education of Arapahoe County School District No. 6 v. Lockhart*, 687 P.2d 1306

(Colo. banc 1984) presented a situation where the attorney who had prosecuted the case against the teacher not only participated in the school board's deliberations, but "actually informed the board that the evidence in the record supported the hearing officer's findings of fact and advised the board that the attorney representing the teacher should not be permitted to make a statement." *Id.* at 1309. The Colorado court found that this "procedure was inimical to the appearance, if not the reality of fairness." *Id.* A second case offered by Mr. Cochran came from Illinois where a teacher did not receive a fair hearing because of the multiple capacities in which the school board and its attorney functioned. In that case, the school's attorney advised the board to exclude all evidence, testimony and offers of proof proffered by the teacher's attorney. *Miller v. Board of Education of School District No. 132*, 200 N.E.2d 838 (1964).

Our case is an even more serious due process violation, because the Board of Trustees never heard testimony or saw evidence. It only based its decision on what Attorney Yendes produced for their review. If the court in *Cochran* was presented with the facts in this case, a different decision in that case would be likely. That is true because here Attorney Yendes provided his opinions to the Board of Trustees; he submitted an incomplete record to it; and completely persuaded them *ex parte* to adopt his version of the evidence. Respondents here agree that Attorney Yendes was present during the closed session deliberations and did comment on the evidence and did express his opinions to the Board of Trustees. Unlike the case in *Cochran*, indicates that Attorney Yendes participated only in a limited capacity. On

the contrary, the minutes indicate that Attorney Yendes participated fully as a Board member / counselor, and provided his findings and conclusions as legal advice. The Board naturally accepted the legal advice of its attorney to deny benefits to Mr. Worley.

This conduct contrasts with the attorney's conduct in *Cochran*. In *Cochran*, the school board's attorney prepared findings of fact and conclusions of law after the school board's decision, and also assisted the dissenting school board members in drafting a separate statement. *Cochran*, 815 S.W.2d at 61. In *Cochran*, the attorney's sworn testimony was that he at no time expressed any opinion or comment to the school board during its deliberations. *Id.* In Mr. Worley's case, it is undisputed that Attorney Yendes provided his comments and opinions in a closed session prior to the Board of Trustees' decision. As a result, the Board adopted word for word Attorney Yendes's legal advice which was not in the record before the Board. The court in *Cochran* would likely have found that the Board and Attorney Yendes violated Mr. Worley's due process right.

No notice was ever given by Attorney Yendes, the Board of Trustees or the City, before or after the decision in Mr. Worley's case, that Attorney Yendes was actually representing the Board of Trustees and the City simultaneously prior to the Board's decision. The first time that Mr. Worley could even have considered that Attorney Yendes's contacts with the Board of Trustees were unlawful, was after it (with Attorney Yendes) made the final decision and Attorney Yendes came out of the meeting to give Mr. Worley the decision. It is clear that neither Mr. Worley nor his counsel had any meaningful opportunity to object,

dispute, or question Attorney Yendes acting as attorney for the Board of Trustees.

In a case involving a potential conflict of interest in an adversarial proceeding, our Supreme Court has stated that such a situation threatens the breakdown of the adversarial process, and the Court has inherent power and duty to intervene, irrespective of the lack of objection by any party. *State v. Planned Parenthood of Kansas, et al.*, 66 S.W.3d 16, 20 (Mo. en banc 2001). Therefore, even if Mr. Worley had a meaningful opportunity to object, which he did not, intervention by this Court is warranted.

Respondents recognize the principle of law set forth in *Hall v. Jennings School District*, 133 S.W.3d 112 (Mo.App. E.D. 2004) with respect to evidence supporting a violation of due process in an agency proceeding. In *Hall*, the case was remanded because of *ex parte* contacts by the superintendent during the board's deliberations. Our case is like *Hall*. The fundamental principles of due process require notice and fair hearing. A party cannot have a fair hearing in a contested case where the other side has an opportunity to present its views to the board (the final decision maker) without participation by the opposing party. *See id.* at 114.

II. The Board of Trustees of the Springfield Police and Fire Retirement System erred in rejecting the hearing examiner's award of duty-related disability retirement benefits to Mr. Worley, because the Board of Trustees' decision was unreasonable, unlawful and unsupported by competent and substantial evidence upon the whole record, which is reviewable under Mo. Rev. Stat. § 536.140 (2005), in that the Board

of Trustees based its decision on evidence outside the record failed to review the record from the administrative hearing as required under Mo. Rev. Stat. § 536.080 (2000) and under Section 2-449 of the Policemen's and Firemen's Pension Plan ordinances, resulting in the Board of Trustees denying Mr. Worley benefits to which he was and is entitled under the Policemen's and Firemen's Pension Plan.

This point is the “other side of the coin” to Point I. The Board of Trustees erred in denying Mr. Worley's claim for duty-related disability retirement benefits by failing to consider the record and by considering evidence outside the record, allowing its deliberations to be swayed entirely by the evidence outside the record. In this case, all the evidence – live testimony, deposition testimony, exhibits, etc., was submitted to a hearing examiner. Hearing Examiner Budd was the only factfinder with first hand exposure to the evidence offered for the record. He was the only factfinder that deliberated on *all* medical opinions offered as evidence. Only he directly considered both sides of the argument as advocated by each party's attorney. Additionally, only Hearing Examiner Budd applied the correct legal standard to the facts presented to him. His findings, conclusions and decision were well-reasoned, balanced, fair and based on a correct reading of statutory law, case law and the Pension Plan ordinances. He showed how much weight he placed on certain items of evidence, and left no relevant stone unturned.

The Board of Trustees, on the other hand, while rejecting the hearing examiner's decision outright, based its decision solely on the argument and opinion of its attorney in the case – who also represented the City, Attorney Yendes. The Board's decision rests entirely

on evidence that was not in the record. In doing so, as stated above, it left out or discounted key items of evidence. As stated in *Clark v. Fag Bearings Corp.*, 134 S.W.3d 730 (Mo. App. S.D. 2004), (a workers' compensation review), "a reviewing court must 'consider all evidence in the record, including that which opposes or is unfavorable to the award, take account of the overall effect of all of the evidence, and determine whether the award is against the overwhelming weight of the evidence.'" *Clark*, 134 S.W.3d at 737 (quoting *Davis v. Research Med. Ctr.*, 903 S.W.2d 557, 571 (Mo. App. W.D. 1995)). This Court must reverse the Board of Trustees' findings "if it is determined the decision is not supported by competent and substantial evidence on the whole record, or if the decision constitutes an abuse of discretion, or is unauthorized by law, or is arbitrary and capricious." Mo. Rev. Stat. § 536.140.2(3). Since this appeal, at Point II, alleges irregularities in procedure and unfairness by the Board of Trustees, this Court may hear and consider evidence concerning those allegations not shown in the record. Mo. Rev. Stat. § 536.140.4. The Pension Plan explicitly states, concerning the Board of Trustees' action after the formal hearing: "The board shall not hear or take any new evidence when reviewing the decision of the hearing examiner." Springfield City Code (Mo.) Section 2-449(d). The fact that the Board of Trustees accepted new evidence through Attorney Yendes, and adopted findings, conclusions and a decision entirely based on his opinion, is convincing evidence that it was improperly influenced. Such evidence was introduced in order to sway the Board of Trustees into rejecting the decision of Hearing Examiner Budd, and it did so.

The record, prepared by Attorney Yendes and submitted to the Board of Trustees for review of Mr. Worley's case, was not the whole record.

The Policemen's and Firemen's Pension Plan is found in the Springfield City Code at Section 2-441, *et seq.* It provides that after the Board of Trustees, the entity created to administer the Policemen's and Firemen's Retirement Fund, reviews the record of the hearing examiner, it shall "accept, modify or reject the hearing examiner's decision." **Springfield City Code (Mo.) Section 2-449(d).** In this case, the Board of Trustees rejected the hearing examiner's decision, therefore, the Pension Plan requires that it have reasons, based upon the evidence, for the rejection, without hearing or taking any new evidence. *Id.*

The complete record from the hearing before Hearing Examiner Budd was composed of transcripts of live witness testimony; deposition transcripts; many exhibits, including evaluations by medical and paramedical providers. All this evidence was placed before him by the parties and was intended to be considered in his decisionmaking – and no doubt it was. After Hearing Examiner Budd's decision was filed with the Board of Trustees, that board, per the Pension Plan, was to review the record made before Hearing Examiner Budd to decide whether to accept, modify or reject his decision. The record for the Board of Trustees' review was submitted to it by Attorney Yendes. The record submitted by Attorney Yendes to the Board of Trustees, however, excluded certain key elements, including the medical opinion by Dr. Tom Kuich, one of the three medical doctors appointed by the Board of Trustees to make all physical examinations required under the Pension Plan; and a letter

to psychiatrist Dr. Shawn Rice requesting his medical opinion as to whether Mr. Worley's disability was a direct result of his duties as a police officer.

The medical evaluation by Dr. Tom Kuich was favorable to Mr. Worley in stating that he had examined Mr. Worley and found him to be disabled as a "result of occupational duties." Admittedly, Hearing Examiner Budd "assign[ed] minimal weight to Dr. Kuich's (*sic*) assessment for the reason that no explanation of the basis for his findings ha[d] been submitted to substantiate his conclusions." Nonetheless, it was considered, and Hearing Examiner Budd referred to Dr. Kuich several times throughout his findings, conclusions and decision. Since Dr. Kuich was one of the physicians required by the Pension Plan to make evaluations concerning duty-related disability retirement benefits, the fact that his opinion was not included *at all* in the record put before the Board of Trustees, and the fact that his name doesn't appear *at all* in the Board of Trustees findings, conclusion and decision, tends to show a intention to disregard his applicant-friendly opinion entirely. The Board of Trustees entirely ignored Dr. Kuich's opinion; never mentioned it.

Attorney Yendes removed the letter because he considered it not properly admitted into evidence. Perhaps this is unimportant considering Hearing Examiner Budd did not acknowledge in his findings, conclusions and decision the misleading request in the letter, but Attorney Yendes further influenced the Board of Trustees' decisionmaking by taking out this evidence that worked in Mr. Worley's favor. "[A]ll probative evidence received without objection in a contested case must be considered in administrative hearings." *Clark*, 134

S.W.3d at 736 (citing *Dorman v. State Board of Registration*, 62 S.W.3d 446, 454 (Mo. App. W.D. 2001)).

“An administrative agency may not arbitrarily ignore relevant evidence not shown to be disbelieved. Only if it makes a specific finding that undisputed or unimpeached evidence is incredible and is unworthy of belief may it disregard such evidence.” *Knapp v. Missouri Local Government Employees Retirement System*, 738 S.W.2d 903, 913 (Mo. App. W.D. 1987); see also *Missouri Church of Scientology*, 560 S.W.2d at 843. The Board of Trustees made no such specific finding and so could not properly ignore that evidence. *Knapp*, 738 S.W.2d at 913.

III. The Board of Trustees of the Springfield Police and Fire Retirement System erred in rejecting the hearing examiner’s award of duty-related disability retirement benefits to Mr. Worley, because the Board of Trustees erroneously applied the law to the evidence, allowing review of the agency decision as provided in Mo. Rev. Stat. § 536.140 (2005), in that the Board of Trustees misconstrued and misapplied the applicable causation and pre-existing condition standard found in the Policemen’s and Firemen’s Pension Plan, Springfield City Code (Mo.) § 2-474, which specifically allows that “[a]ny employee of the police department . . . who becomes disabled *as the direct result* of occupational duties, including but not limited to accidents and or hazards peculiar to the employment, shall be entitled to a duty disability pension,” (emphasis added) irrespective of any latent pre-existing condition, where disability was found by all medical examiners to have directly resulted from occupational duties.

The Board of Trustees errs because it unlawfully changes the legal standard for an award of benefits under the Pension Plan. The Board of Trustees announces the standard that if a claimant has a latent pre-existing condition, he is disqualified from benefits. That is not the law. The Board of Trustees is trying to apply a different legal standard than that imposed by our courts or allowed by their own ordinances. *See Mitchell v. City of Springfield*, 410 S.W.2d 585 (Mo.App. S.D. 1966). “The issue [of] whether a disability must be solely or only partially caused by an injury suffered while on duty in order to qualify for a duty disability pension is an issue of law, involving interpretation of the relevant ordinance.” *State ex rel. Nance v. Board of Trustees for Firefighters’ Retirement System of Kansas City, Mo.*, 961 S.W.2d 90, 91 (Mo. App. W.D. 1998).

The Board of Trustees’ decision states that Mr. Worley suffered from a pre-existing disability. However, there is absolutely no evidence that Mr. Worley actually had any pre-existing disability. It is true that Dr. Shawn Rice, another psychiatrist who evaluated Mr. Worley, testified that Mr. Worley possibly suffered from a medically diagnosable pre-existing condition that was latent. Dr. Rice believed that Mr. Worley’s condition is not duty-related because of this latent pre-existing condition was not caused by work. However, Dr. Rice testified using the wrong definition for duty-related disability. In his testimony, he relied on the definition provided to him by opposing counsel which indicated that duty-related disability meant that work-related causes had to be the sole cause of the disability. That is not the correct definition of “duty-related” in our case law. Moreover, social worker

Steve Moncher assessed Mr. Worley and administered certain psychological tests. His opinion was that Mr. Worley “. . . is not an individual who is presenting with a cognitive deficit. Mr. Worley presents as someone with a good degree of cognitive flexibility. . . . No psychopathology was noted in the responses.”

Even if there was a pre-existing condition, Mr. Worley’s disability was the “direct result of occupational duties” as defined under Missouri case law, including two Springfield Police and Fire Pension Board cases. *See Mitchell*, 410 S.W.2d at 587-588 and *Sprague v. City of Springfield*, 641 S.W.2d 814,820 (Mo. App., S.D. 1982).

“Whatever is the product of two or more concurrent and contributing causes is the direct result of each, though neither is the sole cause.” *Mitchell*, 410 S.W.2d at 588. “It follows, in our opinion and as respondents contend, that an aggravation of an existing psychological condition, to the point where the condition is rendered disabling, may entitle the victim to a duty disability pension if, but only if, the aggravation itself is shown to have been ‘the direct result of occupational duties.’ In such a case the chain of causation remains intact linking the disablement with the duties that conduced to it.” *Id.*

The Board of Trustees cites no authority for the proposition that an award of duty- or nonduty- related disability retirement benefits requires a medically diagnosed condition. A claimant is only required to show he is disabled from performing duties as a Springfield police officer. In fact, the Board of Trustees itself does not argue in its decision that Mr. Worley is not disabled. The Board of Trustees clearly found that Mr. Worley was in fact

medically disabled from performing his duties, without themselves stating a medical diagnosis: “Based upon the evidence as a whole, the Board of Trustees finds and concludes that the Applicant, Roger Worley, is disabled from performing his duties as a Police Officer for the City of Springfield, Missouri.” **R. 85.**

It is irrelevant whether Dr. James Neal, a psychiatrist, diagnosed a medical condition. The Board of Trustees had already found Mr. Worley completely disabled from being a Springfield police officer on December 12, 2002, when they granted a nonduty-related disability retirement pension. The only question before the Board of Trustees, and in this proceeding, is whether the stipulated disability was the direct result of occupational duties. Dr. Neal did acknowledge that Mr. Worley was disabled due to duty-related causes.

The letter from Attorney Yendes to Dr. Shawn Rice is also absent from the record that was before the Board of Trustees for consideration. This is odd, since the letter was presented and discussed at length without objection during Dr. Rice’s deposition testimony. The letter shows that Dr. Rice was asked concerning causation of Mr. Worley’s disability. Attorney Yendes, in the letter, asked Dr. Rice to determine whether Mr. Worley’s disability was directly caused by his occupational duties “as opposed to other factors or causes.” Dr. Rice believed this meant that the “direct result of occupational duties” Mr. Worley’s occupational duties were the sole cause of his disability, without any other consequences or factors. While discussed at length in the deposition transcript, without a copy of the letter itself, there is no clear picture of what Dr. Rice was asked by Attorney Yendes. The Pension

Plan does not require an applicant's disability to be the solely caused by occupational duties "as opposed to other consequences or factors."

Dr. Halfaker, a psychologist initially retained to evaluate Mr. Worley on his workers' compensation claim, testified he did not know the definition of "duty-related" as applied to the Pension Plan Retirement Fund. He testified that Mr. Worley could be diagnosed as having a pre-existing condition. Dr. Halfaker testified several times that there was no indication that Mr. Worley suffered any disability from this pre-existing condition prior to the stress at work. Clearly, Mr. Worley is entitled to duty-related disability retirement benefits, because all of the medical evidence indicates that his disability arose from his duties as a police officer.

The Board of Trustees, however, correctly wrote that in order for Mr. Worley to receive duty-related disability retirement benefits he would have to prove that he became disabled "*because* he was a police officer, not just while he was a police officer." Dr. Rice explicitly testified on page 34 of his deposition; "I believe that becoming a police officer allowed this problem to occur. It was already there, it's just that he was thrown in this situation that was – came to light, due to the job that he has got." **R. 96** (citing Dr. Rice's Deposition). Clearly, Mr. Worley is entitled to duty-related disability retirement benefits, because his disability arose from his duties as a police officer.

The Board of Trustees found as a matter of fact that Mr. Worley is "disabled from performing his duties as a police officer." It also stated, however, that Mr. Worley was only

entitled to nonduty-related disability retirement benefits rather than the significantly greater duty-related retirement benefits because the disability he suffered was not a “direct result” of occupational duties. The Board claims that Mr. Worley has a latent pre-existing condition, a cognitive disorder present from birth, that predisposed him to have problems performing his duties as a police officer. His police duties did not cause this disorder, therefore, according to the Board, his disability was not the direct result of his occupational duties. So the argument goes.

Section 2-474(a) of the Pension Plan provides in pertinent part as follows: “Any employee of the police department . . . , irrespective of length of service, who becomes disabled as the direct result of occupational duties, including but not limited to accidents and or hazards peculiar to the employment, shall be entitled to a duty disability pension.” The Pension Plan defines disability at Section 2-441 as follows: “Disability means disability from performing the labor or occupation which the member was following at the time of the accident, sickness or injury, and not some vocation which he might be able to follow after the accident, sickness or injury.” The Pension Plan provides no definition of “direct result of occupational duties,” but the hearing examiner interpreted that phrase in accordance with *Mitchell*.

The definition of “direct result of occupational duties” as found in *Mitchell* requires a claimant for duty-related disability retirement benefits to “show a direct causal connection between his duties and his disability, or . . . that his disability occurred because he was a

[police officer] rather than merely while he was a [police officer].” *Id.* at 587. It does not, however, require the duties to be the sole cause of his disabilities. *Id.* at 588.

Nance reaffirms the definition in *Mitchell*, when it reversed the circuit court’s decision denying a duty-related disability retirement benefit to Mr. Nance. *Id.* at 95. In that case, Mr. Nance had several pre-existing conditions, including back trouble, when he injured his back on the job, rendering him disabled. *Id.* at 91-92. Mr. Nance was seeking duty-related disability retirement benefits under a plan that, like the plan in Mr. Worley’s case, required the injury be “directly due to and caused by actual performance of duty as a firefighter,” with no mention of that being the “sole” cause. *Id.* at 91. The court in *Nance* went into depth about Missouri law being consistent that “one cannot claim one is not the direct cause of an injury just because one is not the sole cause of that injury.” *Id.* at 94. It stated that the circuit court erred in holding that it did in Mr. Nance’s case. *Id.* at 91.

Another case quite similar to the case under consideration is *Hay v. Schwartz*, 982 S.W.2d 295 (Mo. App. W.D. 1998). *Hay*, a Local Government Employees Retirement System case, specifically dealt with the issue of a psychological disability. The court in that case reversed the board’s decision denying Mr. Hay duty disability retirement benefits. Mr. Hay became disabled due to anxiety, insomnia and depression, with a specific diagnosis of generalized anxiety disorder. *Id.* at 297-298. The board in *Hay* based its decision on a finding of lack of credible evidence, but the court found that, lacking a specific finding concerning the witnesses’ credibility, the testimony of those witnesses (who found that Mr.

Hay was disabled due to his duties as a firefighter) was deemed credible and could not be disregarded. *Id.* at 302.

Prior to and as part of becoming a police officer, Mr. Worley was required to undergo psychological testing. There was obviously nothing in this pre-employment testing that indicated a disability that would prevent him from performing his duties as a police officer. He did a commendable job as a police officer for ten years before becoming disabled. Mr. Worley's test results were apparently not retained by the Springfield Police Department, as evidenced by its failure to produce them upon repeated request. Substantial weight should be given to the fact that no pre-existing condition prevented Mr. Worley from becoming and working as a police officer for several years. That, in addition to the fact that there were no apparent incapacitating psychological factors manifested in Mr. Worley's relationships outside of his work environment, should lead to the reasonable conclusion that his work as a police officer, that is, his occupational duties, directly caused his disability.

Assuming *arguendo* that Mr. Worley actually did have a pre-existing condition, there is no rule of law that this pre-existing condition precludes him from receiving duty-related disability retirement benefits.

CONCLUSION

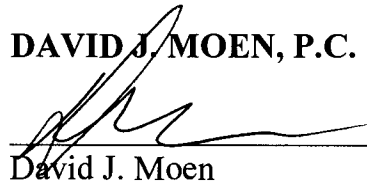
Mr. Worley had an extensive administrative hearing before Hearing Examiner Dennis Budd that resulted in a favorable award for Mr. Worley, and required the City of Springfield to recognize Mr. Worley's claim for duty-related disability retirement benefits. In the

administrative hearing, the City was represented by Attorney Carl Yendes, who argued for reversal of Hearing Examiner Budd's decision to the Board of Trustees. Attorney Yendes met *ex parte* on at least two occasions with the Board as the Board's attorney prior to the Board deciding Worley's case. Attorney Yendes advised the Board orally and in writing to deny Mr. Worley's claim and reject the hearing examiner's decision. The Board of Trustees did so, resulting in a flagrant violation of Mr. Worley's right to due process. Therefore, the decision of the Board of Trustees must be reversed.

The decision of the Board of Trustees does not rest on evidence in the record; instead it is based on the legal advice of Attorney Yendes provided to the Board off the record. Also, the Board of Trustees' decision applies the wrong legal standard to Mr. Worley's claim. The undisputed facts are that Mr. Worley at best *may* have had a latent psychological condition. However, Mr. Worley suffered disability because of incidents at work, which qualifies as duty-related, and thus requires reversal of the Board of Trustees' decision and an award in his favor granting him duty-related disability retirement benefits.

Respectfully submitted,

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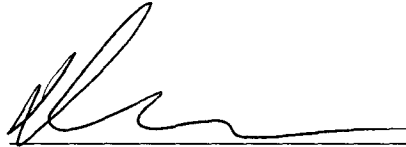
ATTORNEY FOR APPELLANT

**IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT**

ROGER WORLEY,)	GREENE COUNTY
)	
Appellant,)	JUDGE C. DAVID DARNOLD
)	
vs.)	CIRCUIT COURT NO.: 104CC2668
)	
RONALD HOFFMAN, et al.)	CASE NO.: SD29088
)	
Respondents.)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellant's Brief complies with the limitations set forth in Rule 84.06(b), contains 13,103 words and 1,202 lines, as counted by the word-processing software used, WordPerfect Office X3, and that the floppy disk filed together with this Brief in accordance with Rule 84.06(g) has been scanned for viruses and is virus-free.



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CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellant's Brief, two copies of Appellant's Appendix and one copy of the disk required by Rule 84.06(g) were served via U.S. Mail, 1st Class postage prepaid on this 10th day of October, 2008, to:

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