

Employment of Firefighters: Observations on Hiring, Discipline, and Termination

Paul L. Bittner, Esq.
ICE MILLER LLP
250 West Street
Columbus, Ohio 43215
Phone: (614) 462-2228
Email: paul.bittner@icemiller.com
www.icemiller.com



icemiller.com

Hiring

- Qualifications Required by Law:
 - “No person shall be appointed as a permanent full-time paid [firefighter for] the fire department of any township or fire district unless that person has received a certificate . . . evidencing satisfactory completion of a firefighter training program.” Ohio R.C. 505.38(A).
 - The Employee Polygraph Protection Act of 1988 does not apply (you may administer polygraph tests to applicants).
 - Psychological examinations may be performed (but be careful).



icemiller.com

Hiring

- Like other employers, fire departments must take care to avoid discriminatory hiring practices which violate federal, state, and local anti-discrimination laws.
- Do not allow the following to affect hiring:
 - Protected classifications
 - Race, color, national origin, ancestry, religion, gender, pregnancy, age, and disability
 - Genetic information
 - Activities protected under law, such as union affiliation



icemiller.com

Hiring

- Do not ask questions relating to immigration status or sponsorship.
 - However, it is permissible to ask:
 - Are you legally authorized to work in the United States?
 - Will you now or in the future require sponsorship for employment visa status?
 - If the applicant volunteers information about his or her immigration status, you can ask additional questions to clarify the applicant's work status, but avoid discussing citizenship or national origin.

IceMiller® LEGAL COUNSEL icemiller.com

Hiring

- Medical and Disability Issues
 - Avoid pre-offer questions that are likely to elicit information about a medical condition.
- You can ask:
 - If the applicant "can perform the job with or without an accommodation."
 - How the applicant would perform the position.
 - If the applicant can meet your attendance requirement.
 - Only where the applicant has an obvious disability or voluntarily discloses a disability, you can ask whether he/she needs a reasonable accommodation.

IceMiller® LEGAL COUNSEL icemiller.com

Hiring

- Medical and Disability Issues (cont.)
 - Do not ask:
 - If they are healthy;
 - About their use of sick days, FMLA leave, or disability leave at past places of employment;
 - About past workplace injuries or use of workers compensation leave;
 - About addiction treatment or use of prescription drugs.

IceMiller® LEGAL COUNSEL icemiller.com

Hiring

- Create and maintain good records of the hiring process. These will include:
 - Application materials
 - Interview notes
 - Notes relating to the selection decision
- What should you write?
 - What impressed you or concerned you about the applicants.
 - Your reason(s) for offering the position to the applicant and reason(s) for rejecting others who applied.

IceMiller
LEGAL COUNSEL

icemiller.com

Discipline

- Discipline starts with work rules – make your expectations known.
 - List them in your employee handbook, policies, CBA or publish them in some other manner.
 - Obtain signed acknowledgment that the handbook was provided, read, and understood.
- Make the consequences of violating the rules known.
 - Corrective action levels or progressive discipline.
 - Include a statement that levels may be skipped at the employer's discretion.

IceMiller
LEGAL COUNSEL

icemiller.com

Discipline

- Implementation
 - Consistency application of work rules is critical.
 - Don't let lesser instances of misconduct/poor performance slide.
 - Whether it is a counseling or a warning, put it in writing.
 - Describe the misconduct or poor performance in detail and state why it violates expectations.
 - State what the employee must do to improve.
 - Sign and date.

IceMiller
LEGAL COUNSEL

icemiller.com

Termination	
<ul style="list-style-type: none"> • NOT "AT- WILL" Ohio law protects township and fire district firefighters from outright termination. <ul style="list-style-type: none"> • Includes volunteer firefighters • Does not include firefighters on probationary status • Under the law, firefighters "shall continue" their employment "until removed" in compliance with the statutorily prescribed procedure (R.C. 505.38). • If you do this wrong, your dismissal decision will be vacated. So how do you do it right? 	
	icemiller.com

Termination	
<ul style="list-style-type: none"> • The firefighter must be "guilty in the performance of his official duty" (R.C. 733.35) <ul style="list-style-type: none"> • <i>Crist v. Battle Run Fire District</i> – Fire Chief took a swing at a member of the Board of Trustees. The Fire Chief was on medical leave at the time, and thus did not commit misconduct in the performance of his official duty. • <i>Gasper v. Washington Township</i> – Firefighter found guilty in the performance of his official duty even though his misconduct (numerous inappropriate remarks about women and the department's diversity goals) did not occur while fighting fires. The court held that supervision, training, and administrative tasks also qualify as "official duties." 	
	icemiller.com

Termination	
<ul style="list-style-type: none"> • The firefighter must be believed to be guilty of certain conduct (R.C.733.35) : <ul style="list-style-type: none"> • Misfeasance • Malfeasance • Nonfeasance • Misconduct in office • Gross neglect of duty • Gross immorality • Bribery • Habitual drunkenness 	
	icemiller.com

Termination

- Misfeasance, Malfeasance, and Nonfeasance?
 - Misfeasance: The improper doing of an act which a person might lawfully do.
 - Example: negligent performance
 - Malfeasance: The doing of an act which a person ought not to do at all.
 - Example: sexually harassing coworkers
 - Nonfeasance: The omission of an act which a person ought to do.
 - Example: not filing required reports that causes loss

IceMiller® LEGAL COUNSEL icemiller.com

Termination

- Initiation of removal proceedings (R.C. 505.38)
 - The Board of Trustees shall designate the Fire Chief or a private citizen to investigate the conduct that is the subject of the charge.
 - The designated Fire Chief or private citizen will then prepare the written charges -- a detailed statement of the firefighter's alleged misconduct.

IceMiller® LEGAL COUNSEL icemiller.com

Termination

- What's next?
 - The written charges prepared by the Fire Chief or private citizen must be filed with the "legislative authority," which is Board of Trustees of the Township or Fire District. The written charges must be served on the firefighter at his/her home or office, and return of service must be delivered to the Board of Trustees. (R.C. 733.35)
 - After written charges are filed, a hearing of the charges must be held at the next regular meeting of the Board of Trustees. (R.C. 733. 36)
 - The hearing can be held later only if the firefighter requests an extension. (R.C. 733.36)

IceMiller® LEGAL COUNSEL icemiller.com

Termination

- The Hearing (R.C. 733.36)
 - The firefighter must be permitted to appear in person to answer all the charges against him/her
 - The firefighter must be permitted to have an attorney present
 - The firefighter must have the opportunity to examine all witnesses
- The Board of Trustees can subpoena witnesses to testify at and bring documents to the hearing, and must do so upon the firefighter's request. (R.C. 733.38 and *Kiger v. Albon*)
 - Statutory witness fees and mileage must be paid out of the Township or District's general fund. (R.C. 733.39)

IceMiller® LEGAL COUNSEL icemiller.com

Termination

- When is suspension an option? (R.C. 733.37)
 - If the Board of Trustees wishes to suspend the firefighter during the pendency of removal proceedings, a majority of all Board members must vote in favor of the suspension.
 - The suspension may not be longer than 15 days unless the R.C. 733.36 hearing is extended upon the firefighter's request. In no case may the firefighter be suspended for more than 30 days.

IceMiller® LEGAL COUNSEL icemiller.com

Termination

- The outcome
 - After all evidence is heard, the Board of Trustees will issue a decision as to whether to remove the firefighter (R.C. 733.36).
 - Removal of the firefighter requires that two-thirds of all Board members (even those not present) vote in favor of dismissal (R.C. 733.36).
 - The Board's decision is final (R.C. 733.36) and may be appealed to the Court of Common Pleas within 10 days (R.C. 505.38).

IceMiller® LEGAL COUNSEL icemiller.com

Termination

- Other potential pitfalls
 - Waiting too long to bring charges following the firefighter's misconduct. *Crist v. Battle Run*
 - Conflicts of interest (the firefighter is entitled to an impartial tribunal). *Kiger v. Albon, Crist v. Battle Run*
 - A private citizen may be appointed as investigator, but private citizens may not initiate removal proceedings or conduct the removal hearing. *Hurt v. Liberty Township*
 - Making the decision to remove the firefighter without sufficient cause. *Crist v. Battle Run*
 - Not allowing the firefighter to appeal the removal decision. *Ohio ex rel. Mileff v. Mifflin Township*

IceMiller® LEGAL COUNSEL icemiller.com

Termination

- All state, county, and city employees, and all employees of a Civil Service Township fire department that are not specifically included in the Unclassified Civil Service are members of the Classified Civil Service (R.C. 124.11(B)).
 - What does that mean? It means they have a property interest in their positions, and, for firefighters, that means they cannot be removed without adherence to the statutory removal procedure described above.
- Unclassified Civil Service
 - Under Ohio law, that includes Fire Chiefs in Civil Service Townships who are appointed by the Board of Township Trustees. (R.C. 124.11(A)(17)).
 - What does that mean? It means the Fire Chief serves at the pleasure of the appointing authority, has no property interest in his or her job, and no right to due process before being removed.

IceMiller® LEGAL COUNSEL icemiller.com

Termination

- Is your relationship with your firefighters governed by a collective bargaining agreement?
 - R.C. 4117.10(A) permits the CBA to govern the wages, hours, and terms and conditions of public employment and to provide for final and binding arbitration of grievances.
 - You may define "just cause" for termination in the CBA, as long as it does not conflict with civil rights, affirmative, unemployment compensation, workers' compensation, public employee retirement, and residency requirement laws.

IceMiller® LEGAL COUNSEL icemiller.com

Termination

- The seven steps of “Just Cause”
 1. Is the rule or policy that the employee violated work-related, straight-forward, and applied consistently?
 2. Was the employee aware of the rule or policy before committing the violation?
 3. Was the matter sufficiently investigated before deciding the employment action?
 4. Was the investigation fair, free from bias, and objective?
 5. Does substantial proof support that the rule or policy was, in fact, violated?
 6. Were others who violated the same rule or policy treated the same?
 7. Is the employment action warranted, considering the gravity of the offense and the employee’s past work history?

IceMiller[®]
LEGAL COUNSEL

icemiller.com

Questions?

This publication is intended for general information purposes only and does not and is not intended to constitute legal advice. The reader must consult with legal counsel to determine how laws or decisions discussed herein apply to the reader's specific circumstances.

IceMiller[®]
LEGAL COUNSEL

icemiller.com
