

**CITY OF LAUDERHILL FIREFIGHTERS RETIREMENT SYSTEM  
FIRE PENSION MEETING**

March 8, 2016

**I. Call to order**

Sean Henderson called to order the regular meeting of the CITY OF LAUDERHILL FIREFIGHTERS RETIREMENT SYSTEM at 4:09PM on March 8, 2016 at Lauderhill Fire Headquarters, 3rd Floor Conference Room, 1980 NW 56 Avenue, Lauderhill, Fl. 33313.

**II. Roll call**

The Plan Administrator conducted a roll call. The following persons were present:

Sean Henderson, Chairman  
Michael Taussig, Vice Chairman  
Karen Pottinger, Secretary  
Ryan Gabner, Trustee  
Brent Chudachek, Rice Pugatch Robinson Storfer & Cohen, PLLC

Absent: John Leicht, Trustee

**III. Approval of minutes from meeting dated January 12, 2016 and February 8, 2016**

**Motion to approve the minutes by Karen Pottinger, seconded by Ryan Gabner.  
Passed unanimously.**

**IV. New business**

**INFORMAL HEARING – ZACHARY NINGER DISABILITY**

Plan Attorney, Brent Chudachek gave a brief description of the process for the Informal Hearing. Mr. Ninger was represented by counsel who will be attending telephonically.

In this Informal Hearing, Mr. Ninger will bear the burden of proof that he is disabled by a standard of preponderance of evidence. The Trustees will decide whether or not they believe he is disabled, and whether or not he is totally and permanently disabled, or not disabled. If they believe he is disabled, the next phase would then determine if it is service incurred or not service incurred. This is a preliminary hearing. The Trustees can grant the disability today, defer the ruling, or they can deny it. The denial means they would move to a Formal Hearing at a later date. Today the Trustees will review all of the evidence they have been given, hear from Mr. Zachary Ninger and Mr. James Spears.

Mr. Spears joined the meeting telephonically at this time. Mr. Chudachek advised Mr. Spears the meeting was being recorded. Mr. Spears acknowledged and consented. Mr. Ninger was waiting to enter the meeting. When asked for any comments, Mr. Spears stated Mr. Ninger applied for a service-incurred disability. The attorney asked if the Board was aware of the option to grant a

disability and determine it to be non-service incurred. Mr. Chudachek said they were aware. Trustee John Leicht was not able to attend the meeting due to a family emergency.

Mr. Ninger entered the meeting. Mr. Spears was given the opportunity to speak on behalf of his client at this time.

Mr. Spears is representing Zachary Ninger, who has applied for a service incurred disability. He was in a motor vehicle accident on March 29, 2014 while on duty. He was rear ended and sustained injury to his neck and lumbar spine. Workers Compensation treatment was provided. Mr. Ninger also went on his own to see specialists, Dr. Krost and Dr. Eidelson. All records were provided with various findings. There is objective evidence of disk involvement and herniation on the MRI report dated August 5, 2014. The January 12, 2015 MRI of the lumbar spine indicates herniation in lumbar region. Mr. Ninger had a lot of treatments, therapies, and injections, which unfortunately did not improve his condition. Dr. Krost and Dr. Eidelson stated in their evaluations that Mr. Ninger could not and should not perform his duties as a firefighter.

Three Independent Medical Evaluations were conducted. Dr. Sheikh admittedly did not feel that Mr. Ninger was totally and permanently disabled. His report, however, stated that he wanted to have a Functional Capacity Test done to show what Mr. Ninger can or cannot do. Dr. Waeltz's (WC doctor) report indicates that Mr. Ninger went back to work in September 2014 at full capacity with no issue. Dr. Hyde (hired by the Trustees to review all three IME reports) also indicated this in the history portion of the IMEs he reviewed. That is not accurate information. Mr. Ninger returned to work for one shift right after the accident. Dr. Wexler's IME report indicated that he felt Mr. Ninger was totally and permanently disabled as a firefighter however, he indicated he did not believe it was related to his work. The third IME from Dr. Kessler indicated that Mr. Ninger is totally and permanently disabled from service as a firefighter.

The Functional Capacity Test that Dr. Sheikh requested was done on January 26, 2016. The summary is very clear. It indicates that Mr. Ninger did not demonstrate the ability to meet the physical demand requirements of a Firefighter Lieutenant. The summary says he demonstrated consistent performance throughout testing. The evaluation can be considered an accurate representation of his functional ability.

The summary report from Dr. Hyde was to review all of the medical records, MRIs, IMEs and reports. He did not see Mr. Ninger or examine him.

Mr. Spears' position is that records show Mr. Ninger did sustain permanent injury from the accident that occurred while on duty at his employment on March 29, 2014, and it disqualifies him from being a fulltime firefighter according to his job description. The question now is "is permanently and totally disabled and is it service-incurred or non-service incurred?" Records clearly show that he was working until the accident occurred. Mr. Spears' position is that evidence indicates Mr. Ninger should receive a service incurred disability.

Questions and Answers below:

Karen Pottinger: The accident was on March 29<sup>th</sup>, 2014. Treatment started April 21, 2015?

Mr. Ninger: I began treatment on March 29<sup>th</sup>, 2014.

Plan Admin: The treatments Karen are referring to were in 2015. Ms. Pottinger is looking for a clear timeline. She thought you began seeing doctors in 2015.

Mr. Ninger: I went to workers Comp Doctors for the neck and the back in 2014. I only went through Humana after WC gave me Maximum Medical Improvement (September 2014) and released me. We are not allowed to seek treatment from Humana doctors while on WC. To clarify what Mr. Spears was talking about in the IMEs where the reports indicated my going back to work after MMI, the WC doctor made a reference during the September 26, 2014 appointment that I went back to work fulltime as a firefighter without issue. Dr. Sheihk and Dr. Hyde mentioned it in their review and reports. That information is not correct.

Brent Chudachek: Based upon the report you were released to return to full duty per your request by Dr. Waeltz (WC doctor). At that time you indicated you had no functional limitations or restrictions. On September 26<sup>th</sup>, 2014 at your follow up appointment with Dr. Waeltz, you indicated that you were not having any difficulty working your fulltime duty as a firefighter. He also reported that your condition continued to improve and that you wanted to make that visit your last. You were placed at MMI with zero impairment and back to work. On December 23, 2014 you entered into a separation agreement. What happened from September 2014 until the date of the separation agreement?

Mr. Ninger: I did not go back to work. That is not accurate information and I don't know where that information came from. After the September 26<sup>th</sup> appointment I was using sick time and PTO.

Brent Chudachek: To elaborate on the statement that you don't know where the information came from. (reading the progress notes in Dr Waeltz report) "he would like to go back to regular work" and "patient is released to full duty work per his request with a follow up in one month. If he is doing well they will probably place him on MMI at that point". Zack, how many shifts did you work between September 26<sup>th</sup> and December 23, 2014?

Mr. Ninger answered: One. In November or December.

Brent Chudachek: What comp time were you using during this period of time again?

Mr. Ninger: Sick time, PTO and administrative leave.

Plan Administrator: (asking a question that was posed to her by a trustee) Were those leave times due to the injury?

Mr. Ninger: Leave times were due to an administrative action.

Brent Chudachek: Did you not come back to work because of a physical impairment? Or were there administrative issues that did not allow you to come back to work?

Mr. Ninger: If I wanted to come back to work, "administratively" I was not allowed to. When I was cleared to come back to work in August 2014, I didn't think the WC doctors were doing anything to help me. MRIs were not done for months. The process was, frankly, brutal.

Michael Taussig: Zack please elaborate using the word "brutal".

Mr. Ninger: I had an injury, they first began physical therapy without doing an X-ray or MRI. There was no relief from that. I went to an Orthopedist for a second round of physical therapy to no avail. The first MRI was recommended in June 2014. The second MRI was in August. The doctor just kept giving me muscle relaxers. I told the doctor I was feeling better. It had been months with no changes to the treatment. I was fine with closing out workers comp and going through Humana.

Brent Chudachek: If you were doing better by September 26, 2014, what transpired physically, from September 26<sup>th</sup> until the date that you filed for disability? The 2015 reports indicate a steep decline in physical condition after you signed the separation agreement in January 2015. Please explain to the board what happened. You were not on the premises for any reason from the time you signed the separation agreement until the time you filed for disability.

Ryan Gabner asked if they needed to know when his administrative leave started. It seems like there is a time lapse from the time he was able to come back to work and when he signed the separation agreement.

Mr. Ninger stated he went on Administrative leave in April 2014. To answer the Plan attorney, there was nothing that occurred to cause that steep decline. Dr. Waeltz stated the likelihood that someone who had the herniation and disk bulges he has were from the one accident, was possible but the probability was low. I am not going to say that it all happened due to the accident. I don't know that. I know that is what I have. There was no other aggravating injury that occurred after seeing Dr. Waeltz.

Brent Chudachek: There are some reports indicating that those herniation and disk bulges, perhaps, were pre-existing and degenerative. Dr. Wexler said it was a disability but not service incurred because he didn't see how the injury that occurred would have triggered something like that. Dr. Sheikh said no disability. Dr. Kessler said disabled.

Brent Chudachek: Zack, from the time you entered into a separation agreement with the City until the time you filed for disability, without any physical limitations as noted by Dr. Waeltz, had you wanted to come back to work, were you able to?

Mr. Ninger: At the time, yes, I wanted to come back. Being one year after the accident, I know how my back is locked up now. I know the treatments that I have had. I would have tried, stubbornly, to come back and work. Honestly, believe I would have eventually been here asking for a disability.

Brent Chudachek: If the disability isn't warranted, and there was an opportunity for you, does the separation agreement prevent you from doing so?

Mr. Ninger: Yes. But the three doctors that I saw on my own all agree that I couldn't come back to work as a firefighter. That is why I am here.

Michael Taussig: When you signed the separation agreement, why didn't you mention that you had this issue and that you were going to explore getting a disability at that time? The separation agreement states a waiver of all rights or claims which you have or may have against the city. The pension is part of the City.

Mr. Ninger: My Union Attorney checked with the City Attorney regarding that and it only pertains to claims of unfair employment practice, discrimination, or unfair termination from the City. It does not pertain to benefits. I was particularly concerned about WC claims.

Michael Taussig said Mr. Ninger signed off on the WC claim. Mr. Ninger said it is still opened. The Plan Administrator inquired three times and the City did not acknowledge the case was opened or reopened. Mr. Spears stated he is the attorney on record for the WC case and it absolutely is still opened.

Michael Taussig asked to see the hospital report from the incident. The Administrator produced the report document numbered #7 (and also in #13).

Karen Pottinger: Did you have any vehicle accidents before this one.

Mr. Ninger: No

Brent Chudachek: Did you have any back pains or issues with your back prior to the accident?

Mr. Ninger: I have been to the Chiropractor probably ten times during my career. I have been for adjustments once or twice a year. Sometimes just sleeping wrong. Nothing debilitating.

Mr. Ninger: There was a reference in Dr. Hyde's report about receiving additional treatment due to some outside case. I take offense to that. That is ridiculous. I did sue the driver from this accident. That judgement was segregated by WC. I have received nothing. That was due to the accident and they charged \$13,000 in medical bills. Additionally, Humana is reviewing \$27,000 in medical bills that they are trying to put on WC now.

Mr. Ninger: After going through Humana and seeing Dr. Billingham, who sent me for all the injections, I looked for the best spine person I could find. That was Dr. Eidelson. He looked at the MRIs and asked me what I did for a living. I told him I am a firefighter. He immediately said "you can't be a firefighter". I understand there is a separation agreement. This is not a discipline hearing. It is a disability hearing. I have been disciplined. The Board is to consider whether or not, with these injuries, I can function as a firefighter.

Karen Pottinger: Are you working now?

Mr. Ninger: Yes. I work in medical sales.

Plan Administrator: There is a lapse in time from September 26<sup>th</sup> 2014 to January 7<sup>th</sup> 2015. Are there any medical records or doctor appointments that you can produce from that period of time?

Mr. Ninger: I don't believe so. No.

Mr. Spears: I don't think it would be possible for anyone to release Zack to work full duty as a firefighter. He has numerous Physicians saying that he cannot do the job. The fact of the matter is that Zack should never go back to work as a firefighter. I think that should be taken into consideration.

Sean Henderson: (Zack) When you were in the car and had the accident did that accident cause all your pain.

Mr. Ninger: I have never had back pain like this before in my life. Did the accident cause all of it? I cannot say. I don't know. There is obviously some indication of degeneration in the disks.

Sean Henderson: What happens at the Fire Department when a firefighter has a back injury?

Ryan Gabner explained that every case is different. They handle it case by case.

Sean Henderson: What makes my decision cloudy is the fact that you (Mr. Ninger) resigned. It doesn't matter if the doctor said you could or couldn't. You weren't going to be doing that position anyway. So whether you are capable or not, I don't know what that warrants to me.

Mr. Ninger: Base upon the Board disability procedures, what you are supposed to review to determine whether or not I can do the job of a firefighter, and if it was service incurred, are the records relating to the injury. The separation agreement does not make this a disciplinary proceeding.

The plan administrator thinks it could possibly have been clearer if Mr. Ninger applied for the disability before the separation agreement.

Mr. Ninger explained to Mr. Henderson that he took legal advice leading him to sign the separation agreement. He first had the Union Attorney meet with the City Attorney. Mr. Ninger indicated that Bret Schneider said the separation agreement didn't have anything to do with the disability claim or the WC claim.

Mr. Henderson's position was that Mr. Ninger resigned. Period.

Referring to the Functional Capacity Test Summary, Mr. Henderson asked for an explanation of the sentence "Zachary Ninger demonstrated the ability to function in the heavy Physical Demand Category, according to the US Department of Labor". The Plan Administrator explained there are categories in the back of the FCT report on the last page. There are 5 categories. The last two are "heavy" and "very heavy" physical demands. Although Mr. Ninger was able to function in the "heavy" category, his job description describes functions under the "very heavy" category, therefore, he was not able to meet the requirements of a Fire Lieutenant.

Karen Pottinger: His resignation is date March 31, 2015. When was the disability application dated?

The application for disability was submitted on March 30, 2015.

Karen Pottinger: So he was considered an employee until March 31, 2015.

Mr. Spears: This plan does not have any particular disqualifier in their Ordinance for a person who terminated their employment, resigned or planned to resign.

Brent Chudachek advised the Trustees that they have seen and heard the evidence presented. They may rely on one, all or none of these pieces of evidence. This informal hearing is to see if

the member will get the disability granted or have to go to the formal proceeding. Another factor is that Trustee John Leicht is not present at the meeting. Trustees can make a decision. They can defer to a later date to review the records based upon what was heard. Trustees can make a motion to grant the disability, where there will be subsequent motions. Trustees can deny the disability at this juncture. They are completely in their right to make a decision either way.

The Plan Administrator asked a question that she received from a conversation with Trustee John Leicht. Mr. Ninger was released in September 2014 and saw no doctors until the day after he signed the separation agreement on January 7<sup>th</sup>, 2015. Why? Mr. Ninger explained he made the appointment several weeks prior to January 8<sup>th</sup>, 2015.

There will not be a denial of a disability benefit today. There will be either a motion to grant the disability today (with subsequent motions), or to not grant it today and move to the Formal Hearing, or defer making a motion to the next meeting for whatever reason is necessary.

Michael Taussig said he would like to defer to a future date.

**Motion to defer the informal hearing to a later date by Michael Taussig, seconded by Karen Pottinger.** Upon discussion, Trustee Ryan Gabner asked the Plan Attorney if anything transpired during this meeting that would change his legal standpoint on being prepared to make a decision. For example there was a discrepancy pointed out referring to Mr. Ninger being back to work in August 2014. Is there anything that the plan attorney has in his notes that he hasn't heard Mr. Ninger or his attorney speak about? The attorney said that Zack has been very open. He has answered all of the Board's questions. He feels the Board can make an informed decision but if they don't feel comfortable, it is within their right to postpone. Also, Mr. Spears can waive the informal hearing and move to the Formal Hearing. Mr. Spears stated he would like to hear what the decision was and what the basis was and what he would need to proof up at the Final Hearing.

Mr. Henderson said the burden of proof is the applicant's. He feels everyone should give their opinion and move on it. Trustee Taussig said he would consider withdrawing his motion if everyone is prepared to make a decision. Mr. Henderson stated that everyone read the information, they came in with their decision, heard testimony from the applicant and heard from his legal counsel. Either something has changed their decision, or they can stay on their path. Brent Chudachek explained that if Trustee Taussig's motion passed, then they would be re-addressing this again to either grant the disability or not grant it, which would invoke the formal hearing.

**Michael Taussig rescinded his motion and Karen rescinded her second.**

The Chairman passed the gavel to the Vice Chairman, so that he can make a Motion.

**Sean Henderson made a Motion to decide if Zachary Ninger qualifies for a disability benefit at this juncture based upon what he has heard and seen at this meeting, seconded by Michael Taussig. The motion was open for discussion. The motion was amended. The second was amended.**

**Sean Henderson made a Motion to not grant Zachary Ninger a disability benefit at this juncture based upon evidence and testimony presented to the Trustees, where the applicant**

**has not met the burden of proof by preponderance of the evidence. Motion seconded by Michael Taussig.**

The motion was open for discussion. Mr. Henderson explained to Mr. Spears that the motion was made based upon Zack Ninger having to convince the Board that there is disability. There is evidence that convinces a person to form their own opinion.

Based upon the evidence today Zack has not met the burden of proof by a preponderance of evidence. It is not based on any one report or one doctor at this time. If a motion was passed to grant a disability, then the subsequent motions would follow. At that time there would be a discussion of what disqualifying factors there may be. This motion is just to not grant the disability at this time based upon the evidence before them and the documents presented.

Rollcall vote in favor of motion:

Mr. Henderson	yes
Mr. Taussig	defer
Mr. Gabner	yes
Ms. Pottinger	no
Mr. Taussig	yes

**Motion passed.** A Formal Hearing will be scheduled for a future date.

Mr. Ninger asked if his contributions would be returned if the disability is denied at the Formal Hearing. Mr. Ninger is vested. He can leave his money in the fund for a future benefit or he can withdrawal his contributions plus interest, less 20% taxes paid to the IRS on his behalf. The Plan Attorney said if Mr. Ninger is vested, and he withdrew his contributions, he would possibly be forfeiting any future retirement benefits. The Plan Attorney will do some research on this.

This concludes the Informal Hearing.

2. Approve Warrant

**Motion by K. Pottinger to approve warrant in the amount of \$15,209.86, seconded by R. Gabner. Motion passed unanimously.**

3. DROP withdrawal –Richard Grove

Mr. Grove’s paperwork is in order regarding his retirement benefit and supplemental benefit. This can be approved. Mr. Grove submits he needs to defer DROP money payment at this time to determine how and where he wants his rollover or lump sum payment. This should be resolved by the April meeting.

**Motion to approve Richard Grove withdrawal from the DROP and receiving normal retirement benefit and supplemental, contingent upon all paperwork completed. Seconded by K. Pottinger. Motion passed unanimously.**

4. DROP withdrawal –James Robinson

**Motion to approve James Robinson withdrawal from DROP on April 18<sup>th</sup>, 2016 provided all paperwork is complete, seconded by K. Pottinger. Motion passed unanimously.**

5. Withdrawal from plan-Brandon Piscatello termination.

**Motion to approve by R. Gabner, seconded by L. Pottinger, passed unanimously.**

V. Attorney's report given by Brent Chudachek

- Shane Vaughn credit service (military leave)

The attorney continues to research Mr. Vaughn's credited service time for pension purposes. Mr. Vaughn recently handed the Attorney additional documents from the Department of Air Force in regard to exempt status. Brent will review the documents. The important thing is to make certain Mr. Vaughn receives all credited service due him. With Mr. Vaughn's position as a fighter pilot, he is valuable to the Air Force and can be called to active duty from time to time. There is a lot to track and compare. The Attorney will report again at a future meeting.

VI. Plan Administrator's report

The administrator stated anything she had to report on was covered under earlier discussions. This concluded the Administrator's report.

VII. Old business

VIII. Communications

IX. Adjournment

Karen Pottinger motioned to adjourn the meeting at 6:43PM.