

**General Municipal Law
Sections 207-a & 207-c**

Summaries of selected court and administrative decisions

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**The General Municipal Law §§207-a and 207-c
Data Base**

by

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Eligibility for Section 207 benefits [Dearman v City of White Plains, 237 A.D.2d 603]

Although William H. Dearman, a White Plains firefighter, was approved for accidental disability retirement benefits by the Police and Fire Retirement System, White Plains denied Dearman's application for General Municipal Law Section 207-a benefits. Dearman sued, seeking a court order compelling the City to pay him Section 207-a supplemental benefits.

The Appellate Division ruled that Dearman's petition was untimely, having been filed more than four months after the City had made its "final determination." Of greater significance, however was the Appellate Division's observation that the lower court was incorrect in viewing Dearman's action to be in the nature of mandamus to compel the City to perform a statutory duty.

According to the decision, the City is allowed to make its own determination as to whether Dearman was entitled to Section 207-a benefits and the Retirement Systems determination granting Dearman Section 363 disability benefits did not preclude the City from finding him ineligible for Section 207-a benefits. The Appellate Division noted the Court of Appeals' decision in *Cook v City of Utica*, 84 NY2d 833 concerning this point.

Eligibility for Disability Benefits. Can a firefighter be deemed disabled under one section of New York State law but nevertheless be denied disability benefits under another state law? This was the issue in the *Cook* case. [Cook v City of Utica, 84 NY2d 833]

Robert J. Cook, a Utica firefighter, filed an application for accidental disability retirement benefits claiming that he had suffered a "disabling psychological harm" as a result of his firefighting activities.

The State Comptroller approved Cook's application for "performance-of-duty" disability benefits pursuant to Section 363-c of the Retirement and Social Security Law (RSSL). The law provides for the payment of retirement benefits to firefighters injured in the line of duty.

Cook also claimed that he was entitled to benefits pursuant to Section 207-a of the General Municipal Law (GML), which requires the municipal employer to pay a firefighter injured in the line of duty his or her full salary and medical expenses or the difference between the firefighter's full salary and the amount he or she is receiving pursuant to RSSL Section 363-c until he or she reaches the mandatory age of retirement.

The City of Utica decided that Cook's disability was not "causally related" to his firefighting activities and refused to grant him Section 207-a benefits. Cook sued, contending that the Comptroller's determination that his disability was "work related" was controlling. He argued that the City legally could not deny him Section 207-a benefits under these circumstances.

The Court of Appeals, reversing a ruling by the Appellate Division, rejected Cook's argument.

According to the ruling, the Comptroller's determination approving Cook's Section RSSL Section 363-c application was not binding on the City of Utica in its separate proceeding to determine [Cook's] eligibility for benefits under GML Section 207-a."

The Court of Appeals ruled that while a disabled firefighter's Section 207-a benefits may depend in part on benefits paid pursuant to RSSL Section 363-c, there is no specific statutory language or anything in the legislative history concerning these measures suggesting that the Comptroller's eligibility

determination with respect to RSSL benefits precluded the municipal employer from making a separate, and, as here, contrary determination with respect to an individual's eligibility for GML Section 207-a benefits.

The Appellate Division ruled in two cases involving the independence of the processes for determining disability benefits under RSSL Section 363 and GML Section 207-a.

In *D'Onofrio v City of Mt. Vernon*, 226 A.D.2d 719, the Court said that a firefighter approved for disability retirement under Section 363 had failed to exhaust his administrative remedy because he abandoned a grievance he had filed under a Taylor Law contract procedure for determining his entitlement to Section 207-a benefits and instead initiated an Article 78 proceeding to compel the City to pay him such benefits. The Court indicated that "a firefighter who qualifies for a line-of-duty disability retirement pension is not automatically entitled to the benefits of GML Section 207-a."

In another case, *Bernhard v Hartsdale Fire District*, 226 A.D.2d 715, the Appellate Division ruled that although the Workers' Compensation Board determined that Bernhard had been injured in the line of duty and Bernhard had applied for and was approved for disability pursuant to Section 363 of the Retirement and Social Security Law, "it cannot be said that [Bernhard] was physically unable to perform his regular duties as a result of his injuries."

In addition, the Court noted that Bernhard had requested that he not be given light duty assignments. It upheld the Board of Fire Commissioner's decision rejecting Bernhard's application for "supplemental wages" otherwise available pursuant to Section 207-a.

The full slip opinion in the Cook case follows:

IN THE MATTER OF ROBERT J. COOK, RESPONDENT, v.
CITY OF UTICA ET AL., APPELLANTS.

88 NY 2d 833, 666 N.E.2d 1352, 644 N.Y.S.2d 479 (1996). April 30, 1996

4 No. 110[1996 NY Int. 99] Decided April 30, 1996

James W. Roemer, for Appellants. Mary Beth Hynes, for Respondent. New York State Conference of Mayors and Municipal Officials; New York State Professional Firefighters Association, amici curiae.

MEMORANDUM:

The order of the Appellate Division should be reversed, with costs, and the petition dismissed.

Section 363-c of the Retirement and Social Security Law ("RSSL") provides for payment of benefits to firefighters who become incapacitated as a result of the performance of their duties. Eligibility for such benefits is determined by the Comptroller (*id.*, Sections 363-c[d], 374[b]). Firefighters employed by certain municipalities may also be covered by General Municipal Law ("GMC") Section 207-a, which requires the employing governmental entity to pay full salary and medical expenses to firefighters who are injured in the performance of their duties. Under the statute, such firefighters who are also granted Retirement System benefits for performance-of-duty or accidental disability (see, RSSL Section 363) are entitled to receive from the employing municipality "the difference between the amounts received [from the Retirement System] and the amounts of [their]

regular salary or wage" until such time as they reach the point of mandatory retirement (GML Section 207-a[2]).

Claiming to have suffered disabling psychological harm as a result of his firefighting activities, petitioner applied to the State Retirement System for performance-of-duty disability benefits pursuant to RSSL Section 363-c. The Comptroller determined that petitioner was permanently incapacitated for performance of duty as a result of his service and approved the payment of benefits. Subsequently, respondents held a hearing on petitioner's pre-existing application for disability benefits under General Municipal Law Section 207-a. Respondents ultimately denied petitioner supplementary benefits under section 207-a after finding, contrary to the Comptroller's determination, that petitioner's disability was not causally related to his employment. Petitioner then commenced the present proceeding to challenge respondents' determination.

Contrary to the conclusion of the court below, we hold that the Comptroller's determination on the causal-relationship issue in connection with petitioner's section 363-c application was not binding on respondents in their separate proceeding to determine petitioner's eligibility for benefits under GML Section 207- a. As we noted in *Sutka v Connors* (73 NY2d 395, 398), RSSL Section 363-c and GML Section 207-a "represent separate disability systems with differing coverage and consequences." Further, although the amount of a firefighter's section 207-a(2) benefits may depend in part on the benefits available to that firefighter under RSSL Section 363-c, there is no specific statutory language or history suggesting that the eligibility determinations for these distinct classes of benefits were not intended to be separately made. We note that municipalities are not parties to proceedings before the Comptroller under RSSL Section 363-c and, accordingly, common-law principles of collateral estoppel cannot be invoked to support the conclusion petitioner seeks.

Inasmuch as respondents were entitled to make their own determination about the extent and cause of petitioner's illness, their decision denying him section 207-a(2) benefits should be reinstated. Petitioner's alternative argument that respondents' determination was not supported by substantial evidence is lacking in merit.

Order reversed, with costs, and petition dismissed, in a memorandum. Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Smith, Levine and Ciparick concur.

Employer applications for disability retirement.

Both the Retirement and Social Security Law [RSSL] and Sections 207-a and 207-c permit an employer to file an application for accidental disability retirement on behalf of an employee. Two decisions by the Appellate Division involved situations in which employer-initiated disability retirement applications were key elements in the litigation. [Natoli v City of Kingston, 600 NYS2d 780; O'Neill v City of Schenectady, 599 NYS2d 660]

The Natoli Decision

The Natoli case illustrates what could happen in the event the individual is removed from the payroll when such an application is filed and is later disapproved by the retirement system.

In 1987 the City of Kingston chief of police filed an employer application on behalf of a police officer, Natoli, in connection with an injury Natoli suffered in 1971 [see Section 363.b(2), RSSL]. Natoli who had been on "disability leave" since 1971, was removed from the payroll effective January 6, 1988. The Comptroller's disapproval of the application for accidental disability retirement filed on behalf of Natoli was upheld by the

Appellate Division [see *Riggins v Regan*, 167 AD2d 802]. As a result of the Comptroller's determination, the city was required to reinstate Natoli to the payroll for the period January 6, 1988 through September 12, 1989, on which date Natoli retired.

Natoli later sued for the restitution of certain benefits to which he claimed he was entitled and, in addition, alleged that he had suffered "mental anguish" because of "the [city's] delay in making full restitution."

The Appellate Division indicated that Natoli was entitled to back salary, with longevity increments and interest, adjusted to reflect any disability retirement benefits he had received during this period. In addition, it agreed that Natoli was entitled to reimbursement for medical, dental and life insurance premiums and for appropriate vacation and sick leave credits that he would have otherwise earned during this period. As to Natoli's claims concerning mental anguish resulting from the delay in providing certain benefits due him and statements alleged to have been made "as part of a personal campaign to prevent him from being restored to the payroll," the court held that his allegations "fall far short of the outrageousness necessary to state an emotional injury claim."

The O'Neill Case

In 1984 a court found that O'Neill, a Schenectady police officer, was entitled to the compensation and medical benefits authorized by Section 207-c of the General Municipal Law. The order implementing the decision included a provision to the effect that O'Neill could be subjected to "further psychological testing" as may be ordered.

In 1987 the police department filed an application with the retirement system seeking to have O'Neill retired for accidental disability. The Comptroller rejected the department's efforts to

retire O'Neill on the grounds that O'Neill's disability was caused by a preexisting condition and not an accidental injury in the line of duty. In 1991 the department directed O'Neill to report for a medical examination in connection with "yet another retirement application."

O'Neill's attorney told the department that O'Neill was not available on July 12, 1991, the date scheduled for the examination. The attorney contended that the department was harassing O'Neill and suggested that it apply for a "court ordered examination." On September 25 O'Neill's Section 207-c benefits were terminated "because of his failure to attend the scheduled medical examination." When the Supreme Court ruled that O'Neill's Section 207-c benefits had been improperly terminated, the city appealed.

The city argued that it was justified in ending O'Neill's benefits as Section 207-c provides that "any injured or sick policeman who ... shall refuse to permit medical inspections as herein authorized ... shall be deemed to have waived his rights" The Appellate Division agreed that the law so provided but observed that O'Neill never refused to submit to medical examination or inspection.

The Appellate Division rejected the department's argument that a court-ordered examination was not required under the circumstances. It decided that since O'Neill's nonappearance for personal reasons was neither a refusal nor a waiver within the meaning of Section 207-c, it would uphold the Supreme Court's determination that the termination of O'Neill's Section 207-c benefits was arbitrary and capricious.

EMT Differential

If a police officer or firefighter is permanently incapacitated as a result of an on-duty injury, he or she is eligible for "performance of duty" disability under Section 363-c of the Retirement and Social Security Law. Benefits are equal to half of the employee's final average salary. To be eligible, the employee must be a member of the policemen's and firemen's retirement system and the injury cannot be the result of the employee's own negligence. John Carpenter, a firefighter with the city of Troy, was awarded this form of disability pay and later sued claiming he was entitled to extra pay because he was an Emergency Medical Technician, and EMTs receive a differential [Carpenter v City of Troy, 192 A.D.2d 920].

Carpenter contended that the city should "include [his] emergency medical technician salary differential and holiday pay in the calculation of [his] past, present and future retirement benefits." Also, he contended the city owed him "earned and accrued vacation pay and compensatory time."

The Appellate Division rejected his appeal from a lower court ruling dismissing his petition. The court said that Carpenter had not shown any clear legal right to the relief that he demanded. It found no basis for his claim that he had not received a cash payment for the full amount of his accrued compensatory and vacation leave credits due him at the time of his retirement for disability.

Although Carpenter had argued that the city had the burden of showing it had paid him all the sums to which he was lawfully entitled, the Appellate Division said that Carpenter had the duty of showing "his right to performance ... so clear as not to admit of reasonable doubt or controversy." In other words, before the court would compel the city to act, Carpenter would have to prove that

he was entitled to payments for compensatory time and vacation credits that the city had refused to make to him.

As to Carpenter's claims regarding retirement benefits based on the value of the salary of an emergency medical technician differential and holiday pay, the court agreed with the city that "these benefits do not constitute 'regular salary or wages' within the purview of General Municipal Law Section 207-a."

Evaluating disability claims

The rejection of an application for accidental disability retirement typically hinge on the resolution of two important questions: (1) Did the individual suffer a line-of-duty injury? and, if so, (2) did the injury result in a permanent disability? The Vasquez and Furch consider the elements involved in making such determinations.

The Vasquez Case: [Vasquez v Board of Trustees NYCFD, NYS Supreme Court, [not officially reported]

Vasquez, a New York City firefighter, claimed that he had sustained line-of-duty injuries including the rupture of his right Achilles tendon in 1983, a meniscus injury to his left knee in 1988, partial rupture of his left Achilles tendon in 1991, and a herniated disc in the cervical spine in 1993. The Fire Department filed an application for disability retirement on behalf of Vasquez on December 19, 1994 and on February 20, 1996 and on August 26, 1996 Vasquez filed his own applications for accident disability retirement. On September 10, 1996, the Board of Trustees of the New York City Fire Department Article 1-B Pension Fund [Trustees] decided to retire petitioner on ordinary disability retirement, not accidental disability retirement.

According to the ruling, the 1-B Medical Board concluded that the Achilles injuries and the lumbar degeneration were non-disabling; the herniated disc in the cervical spine was non-duty related; and the knee problem was not permanently disabling.

Vasquez sued, seeking a judgment annulling the Trustees' decisions. He argued there was no credible or substantive dispute as to his condition among the medical experts. The Trustees, on the other hand, argued that Vasquez failed to meet his burden of proof that his line-of-duty accidents caused his disability. Significantly, the Trustees contended that Vasquez had filed untimely line-of-duty injury reports concerning the events underlying his claims, "although over the years he had filed many."

Two fellow firefighters provided affidavits supporting Vasquez's account of the events at issue. But the Trustees urged that the Court not give much weight to the fact that because the statements were dated more than a year and a half after the incident Vasquez claimed caused his disability.

Finally, the Trustees contended that the fact that Vasquez never returned to full duty "is not sufficient to overcome the copious medical evidence on the record."

Although the Medical Board's determination as to whether an applicant is disabled is binding upon the Trustees, the Court said that the issue of whether the disability is service-related is solely for the Board of Trustees to decide, citing *Canfora v. Board of Trustees*, 60 NY2d 347, 351. Commenting that there was an "exhaustive review of the objective and subjective evidence" by the 1-B Medical Board, the Court concluded that the record supported the Trustees' determination.

New York State Supreme Court Justice Belen noted the Trustee's vote was 6-6. Justice Belen commented that "if the Trustees'

decision is based on a tie vote, the court cannot disturb an administrative determination unless it can find causation as a matter of law (*City of New York v Schoeck*, 294 NY 559, 570)." To prevail, Vasquez had to show that "the circumstances admit but one inference," i.e., that his line-of-duty injuries were the proximate cause of his disability. As he did not meet this test, "nor has he proved that they exacerbated a latent condition," the Court sustained the Trustees' determination and dismissed Vasquez's petition.

The Furch Case: [*Furch v Bucci*, 245 A.D.2d 749; 254 A.D.2d 642; motion for leave to appeal denied, 93 N.Y.2d 833]

City of Binghamton firefighter James L. Furch applied for General Municipal Law Section 207-a benefits, claiming that he suffered from arteriosclerosis brought on by job-related factors. He claimed these job-related factors ultimately resulted in a heart attack while he was raising a flag while on duty at a fire station.

The hearing officer appointed by the City, Director of Personnel and Safety David W. Watkins, ruled that Furch's "myocardial infarction and underlying arteriosclerosis were not caused by the performance of his duties as a firefighter" and his application for Section 207-a benefits was rejected by the City.

Among the points made by the Appellate Division in the appeal that followed was the following:

The fact that a Workers' Compensation Law Judge ruled that Furch's myocardial infarction was causally related to his employment, the binding effect of the decision rendered in the workers' compensation proceeding did not preclude [Binghamton] from denying [Furch's] application for benefits pursuant to General Municipal Law Section 207-a.

Evaluation of degree of injury

Courts have consistently ruled that where there has been conflicting testimony concerning the events or nature of the disability, the Comptroller could make his determination on the basis of his crediting the testimony of one witness over that of another witness. This is shown in the Newman case. [Newman v NYS Police and Firemen's Retirement System, 186 A.D.2d 306]

Newman injured his lower back and right hip while performing his duties as a police officer. The police department placed him on "light duty" and Newman applied for accidental disability retirement benefits. However, there was conflicting medical testimony concerning whether Newman was permanent incapacitated as a result of these injuries. The Comptroller credited the opinion of one physician over that of another and denied Newman's application for accidental disability retirement benefits. Newman appealed the Comptroller's decision.

The Appellate Division dismissed the appeal, indicating that the Comptroller "could properly credit the testimony by one physician that there was no objective evidence of a disabling condition and that [Newman] was capable of performing his duties" over that on another who testified that Newman was permanently disabled. The court said that the Comptroller's determination was supported by substantial evidence and thus must be upheld. The Appellate Division said that the fact that Newman had been placed on "restrictive assignment or light duty" did not show that he was permanently disabled.

Exaggerating injury.

From time to time employers suspect injured employees are exaggerating the effects of their injury so as to obtain easier work

assignments. The DeSapio case shows that probationary employees can be dismissed without a hearing if they are deemed to have abused their right to restricted duty by claiming their injury is worse than it is. [DeSapio v Koehler, 551 NYS2d 1]

Martin DeSapio, a probationary Correction Officer in New York City, injured his knee. According to the court decision, DeSapio took advantage of the knee injury to remain on restricted duty an excessively long time, and then improperly sought a full-duty assignment at a location with minimal, if any, inmate contact. The appointing authority determined that DeSapio had failed to satisfactorily complete his probationary period. DeSapio then sued, claiming that he had been dismissed without a hearing and without reasons being stated.

As a probationary employee, DeSapio could be terminated without a hearing and without reasons being stated, provided the termination was made in good faith and not capriciously. The Appellate Division, First Department, upheld a lower court's ruling that dismissing DeSapio did not constitute bad faith or capricious action.

The record "supports the conclusion that neither disability nor injury was the reason for [DeSapio's] dismissal, but rather his misuse and evasion of the liberal leave and restricted duty policies of the Correction Department," the Appellate Division ruled.

Another factor to consider is the extension of the probationary period in the event a probationer is given a light duty assignment. Boyle v Koch, 68 NY2d 601, involved two probationary firefighters who were injured on the job. They were given extended sick leave and later provided with light duty assignments for more than a year. Their respective probationary periods were extended as a result. They were terminated as "probationers" despite their claim

that they had attained tenure on the basis of their satisfactory performance of light duty.

The Court of Appeals ruled that the extension of the probationary period was proper. The employees, not having performed the full duties of firefighter for the maximum period of probation, could not claim tenure rights on the basis of their satisfactory performance of "light duty." The ruling indicates that an employer is entitled to evaluate the worker's fitness for appointment in terms of probationary performance in their "normal" assignment. As neither had completed the probationary period performing their full duties, their termination was held lawful.

Exhausting administrative remedy.

Just what is required in order to have a court assume jurisdiction for the purposes of reviewing an administrative decision concerning an individual's fitness to return to work following the granting of a leave of absence for medical reasons? This is sometimes a difficult question to resolve. Typically the courts rule that before a matter may be judicially reviewed, the individual must exhaust his or her "administrative remedies." In the Levine case, the court was asked to consider the need to exhaust administrative remedies in cases where it is alleged that the administrative agency or process followed by the administrative agency violates the individual's constitutional rights to due process. [Levine v Board of Education, Appellate Division, Second Dept 173 A.D.2d 619].

In 1984 Levine's physician notified the Board of Education that Levine was under his care for anxiety neurosis and was totally disabled. Levine was later examined by the Board's psychiatric consultant and an independent medical arbitrator and repeatedly found to be unfit to resume his teaching duties. During this time

Levine was placed on a continuing leave of absence without pay. In 1985 Levine asked for an "in-person fitness reevaluation." After he provided the Board with a "status report" from his consulting psychologist, which contained a favorable prognosis, the Board reviewed Levine's medical records and decided that "an in-person fitness reevaluation" was not warranted at that time. Subsequent examinations of Levine by the Board's medical bureau resulted in a determination that he remained unfit for duty.

Levine then sued, claiming that his due process rights were violated by the Board requiring him to submit proof of on-going analysis or a report from a private analyst as a condition to his being given future re-evaluations. He also claimed that the Board's decision was arbitrary and that it failed to provide him with a copy of the medical bureau's report which formed the basis of its determination. The Supreme Court judge decided that the Article 78 action brought by Levine should be dismissed but subject to renewal "after an independent evaluation by a medical arbitrator" in accordance with the terms of a Taylor Law agreement between the Board and Levine's union.

In essence, the Court ruled that Levine first had to exhaust his administrative remedies, here provided by the negotiated agreement, before he could seek a judicial review of the matter. Levine then appealed the dismissal of his complaint. The Appellate Division affirmed the lower court's ruling, holding that although the exhaustion of administrative remedies is not required where an agency's action is challenged as unconstitutional, the mere assertion that a constitutional right is involved will not excuse the failure of the individual to pursue established administrative remedies that can provide the required relief. The Court said that where a constitutional claim hinges on factual issues reviewable at the administrative level, that claim must first be addressed to the agency so that a necessary factual record can be established.

The decision in Levine indicates that the claim that "it is medically unreasonable to assume that the psychological problem which rendered [Levine] unfit to teach will continue to exist without treatment is precisely the type of claim on which the expertise of a medical arbitrator, brought to bear on a proper record, would be particularly valuable." Under the circumstances, the failure to pursue established administrative remedies cannot be excused and the proceeding was properly dismissed [by the lower court] for failure to exhaust administrative remedies. Also noted was the fact that the Board had supplied a copy of its medical unit's report to Levine's therapist and his "due process claim is thus without merit." This appears to support the argument that an agency is not required to supply a copy of an employee's medical evaluation to the individual himself or herself if it elects to provide a copy of the report to the employee's medical advisor. In some cases an agency may argue that it is reluctant to supply an individual with a copy of such a report because of a fear that it might be adverse to that individual's medical or psychiatric condition or that it could result in that individual taking adverse action against another. It appears that sending the data to the individual's representative will suffice.

Another case concerning the exhaustion of administrative remedies concerned City of Yonkers firefighter Frederick C. Hoffman. Hoffman was awarded accidental disability retirement benefits pursuant to Section 363 of the Retirement and Social Security Law [RSSL]. When the City refused to pay Hoffman wage supplement benefits pursuant to Section 207-a(2) of the General Municipal Law, he sued and won a court order directing Yonkers to pay the supplement.

Section 207-a generally provides that the employer is to pay the salary, medical and hospital expenses of firemen with injuries or illness incurred in performance of duties. Subdivision 2 of Section 207-a provides that such salary shall be discontinued with respect

to any fireman who is permanently disabled as a result of an injury or sickness incurred or resulting from the performance of his duties if such fireman is granted an accidental disability retirement allowance pursuant [various sections of RSSL] provided, however, that in any such case such fireman shall continue to receive from the municipality or fire district by which he is employed, until such time as he shall have attained the mandatory service retirement age applicable to him or shall have attained the age or performed the period of service specified by applicable law for the termination of his service, the difference between the amounts received under such allowance or pension and the amount of his regular salary or wages.

The Appellate Division reversed the lower court's ruling and ruled in favor of the City. The Court commented:

- a. The fact that a firefighter is awarded an accidental disability retirement allowance pursuant to RSSL Section 363 does not automatically entitle the firefighter to disability differential payments pursuant to General Municipal Law Section 207-a(2), citing the Court of Appeals ruling in *Cook v City of Utica*; and
- b. Hoffman failed to exhaust his administrative remedy, apparently alluding to the fact that Yonkers could make an independent determination as to whether Hoffman's disability was job related or not.

The City of Utica had similarly denied one of its firefighters, Robert J. Cook, supplemental salary benefits pursuant Section 207-a(2) after finding, contrary to the Comptroller's determination, that Cook's disability was not causally related to his employment.

The Court of Appeals ruled in that case that the Comptroller's determination on the causal-relationship issue in connection with Cook's Section 363-c application was not binding on Utica in their

separate proceeding to determine Cook's eligibility for benefits under GML 207-a.

Although the amount of a firefighter's Section 207-a(2) benefits may depend in part on the benefits available to that firefighter under RSSL 363-c, there is no specific statutory language or history suggesting that the eligibility determinations for these distinct classes of benefits were not intended to be made separately.

The Court of Appeals noted that Utica was not a party in the proceedings before the Comptroller under RSSL 363-c and, therefore, the common-law principles of collateral estoppel could not be invoked against it. Collateral estoppel prevents legal issues that have already been decided from being revisited in certain cases.

Under the circumstances, said the Court of Appeals, Utica was entitled to make its own determination about the extent and cause of petitioner's illness. It reinstated its decision denying him Section 207-a(2) benefits.

However, Section 207-a authorizes the appointing authority to file an application for accidental disability retirement benefits on behalf of a firefighter.

Section 207-a.2 specifically provides that "[I]f application for such retirement allowance or pension is not made by such fireman, application therefore may be made by the head of the fire company or fire department or as otherwise provided by the fire district or by the chief executive officer or local legislative body of the municipality by which such fireman is employed."

In the event the employer's application for accidental disability retirement allowance or retirement for disability incurred in

performance of duty allowance filed on behalf of the firefighter is denied by the Retirement System, "the fire district or municipal corporation by which such fireman is employed may appeal such determination."

Presumably in cases where the employer files the application on behalf of the firefighter, it would not be entitled to make an independent decision regarding the cause of the firefighter's disability. By filing for such an accidental disability benefit on behalf of the firefighter it is conceding that the disability was work-related.

Exhausting leave accruals:

At least 12 weeks of FMLA leave must be provided. If an employer provides less than 12 weeks of paid leave, it must supplement the paid leave with unpaid leave so as to provide at least 12 workweeks of leave during a 12-month period. An individual requesting FMLA leave may be required to use, or exhaust, any or all leave accruals, including vacation, sick leave, personal leave and family leave, in connection with the use of FMLA leave.

If both spouses work for the same employer, the employer may limit "the aggregate number of workweeks of leave to which both may be entitled" to 12 workweeks for other than personal illnesses or the illness of a spouse or child. The total amount of FMLA leave to care for a sick parent in such situations is thereby limited to 12-workweeks in the aggregate. This means that many employers will have to maintain additional leave records sufficient to provide the data necessary to make certain that its leave policy, and its leave decisions concerning any particular worker, conforms to the requirements of the act.

Eligibility for FMLA leave is triggered by a serious health condition but that term is not defined in the act. Also, the act permits an employer to require that the employee submit a certification of the existence of a "serious health condition" by a doctor of medicine or osteopathy. If the employer "has reason to doubt the validity" of the certification provided by the employee, it may require the employee to obtain a second opinion, at the employer's expense, from a health care provider designated or approved by the employer. If as a result of this second examination there are conflicting opinions, the employer may require that a third opinion be obtained, again at the expense of the employer, from a health care provider jointly agreed upon by the worker and the employer.

A number of commentators have recommended employers not attempt to define "serious health conditions" or "second opinion." They suggest that the basic policy should provide that unless the employer believes that the employee is improperly attempting to obtain FMLA leave, it will routinely approve employer requests for FMLA leave. In other words, employers should avoid a "highly technical" approach to reviewing and approving FMLA leave requests.

Among the problems that could occur in the absence of a "liberal policy" are those resulting when the employee does not use a medical doctor or osteopath for health care.

Some health insurance plans provide coverage for care provided by non-traditional methods or by persons who are not physicians. Experts caution that in the event an employer decides not to grant FMLA leave because the worker does not or cannot provide a certificate from a medical doctor or osteopath, litigation claiming religious or other discrimination may follow.

The Family and Medical Leave Act. The Family and Medical Leave Act of 1993 [FMLA] took effect on August 5, 1993. Among the significant mandates set out in the law are:

-- Employers must provide up to 12 weeks of unpaid leave for the birth or adoption of a child or serious family illness. In cases of serious illness, employers may require verification of the illness and also require a "second medical opinion."

-- In cases of childbirth or adoption, the employee is required to provide at least 30 days notice for "foreseeable" absences. Health insurance is to be continued for persons of FMLA leave and employees are guaranteed reemployment upon their return from leave. Paid leave may be counted to determine the twelve-week period for FMLA leave purposes.

FMLA covers state and municipal employees as well as private sector employees. [Federal "civil service" employees are covered by a separate provision, Title II.] To be eligible for FMLA leave, the employee must have been employed for at least 12 months and worked at least 1,250 hours during the previous 12-month period.

Section 401 of the act provides that "nothing in [the FMLA] or any amendment made by [FMLA] shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under [FMLA]...." The same limitation would probably apply where "greater benefits" are provided by a negotiated labor agreement.

The act requires employers having 50 or more employees to give covered workers at least 12 weeks of unpaid leave in connection with the (1) employee's personal illness, (2) the birth or adoption of a child, or (3) for the employee to care for a seriously ill spouse, child or parent.

A critical element of FMLA is job security. Although FMLA leave is expected to be "full-time leave" the employer and employee may agree to make such leave available on an intermittent basis or under a "reduced leave schedule."

An option available in the event an employee asks for "intermittent" or a reduced leave schedule is the assignment of the individual to another position, with equal pay and benefits, that would better accommodate the situation.

In addition, there is a "whistle blower" type provision contained in FMLA. The act provides that it is unlawful for an employer to discharge or discriminate against an employee "for opposing any practice made unlawful FMLA." The major elements of the act are outlined below.

Health and life insurance for retirees.

The Armistead case addresses an increasingly troublesome issue, the rights of retirees regarding employer health and life insurance plans. [Armistead v Vernitron Corp., 944 F.2d 1287]

In this case, a U.S. Circuit Court of Appeals affirmed a lower court ruling that held that when a collective bargaining agreement is intended to give retirees with lifetime health and life insurance benefits, such benefits were not subject to unilateral termination.

Although this case was decided under Section 301 of the federal Labor-Management Relations Act and the Employee Retirement Income Security Act, it may suggest the outcome of a challenge to the reduction or elimination of a retiree's health and life insurance benefits by public employers.

Administering General Municipal Law Sections 207-a/207-c and providing benefits thereunder.

The General Municipal Law Section 207-a and 207-c Case Book

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