**GLEASON, DUNN, WALSH & O'SHEA**
**ATTORNEYS**
**40 BEAVER STREET**
**ALBANY, NEW YORK 12207**
**(518) 432-7511**
**FAX (518) 432-5221**
**www.gdwo.com**

FRANK C. O'CONNOR III
BRENDAN C. O'SHEA
MARK T. WALSH
RONALD G. DUNN
THOMAS F. GLEASON
MICHAEL P. RAVALLI*
LISA F. JOSLIN†
RICHARD C. REILLY
TAMMY L. CUMO^

DANIEL A. JACOBS
NATALIE S. PETERMAN
BRENDAN D. SANSIVERO
DANIELLE L. PENNETTA†◊
CHRISTOPHER M. SILVA*

HAROLD E. KOREMAN
(1916 – 2001)

* ALSO ADMITTED IN CONNECTICUT
† ALSO ADMITTED IN VERMONT
^ ALSO ADMITTED IN MASSACHUSETTS
◊ ALSO ADMITTED IN NEW JERSEY

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# THE INTERSECTION OF SICK LEAVE, GML 207-A BENEFITS, CIVIL SERVICE LAW §§71 AND 72 AND NEW YORK STATE DISABILITY RETIREMENT – A REVIEW OF BENEFITS AND BEST PRACTICES

A recurring issue in all fire departments involves illness and injury. More to the point, Firefighter Unions should ask how to protect members who are injured or become sick whether on or off the job.

What follows is an analysis of the statutes of widest application[1] and how best to apply these statutes consistent with members' interests. We also include suggestions for how to tailor the collective bargaining agreement to provide the greatest protection. We begin with General Municipal Law §207-a.

## THE RIGHTS OF INJURED FIREFIGHTERS UNDER GENERAL MUNICIPAL LAW SECTION 207-a

The General Municipal Law provides firefighters with a powerful disability program. This statute is significantly more beneficial than workers' compensation. Not surprisingly, the benefits can be quite expensive and in some cases continue for decades. The statute has become a flashpoint for municipalities and firefighter unions over the last few years as municipalities seek to control budgets and unions strive to protect their injured members.

[1] Firefighters in the City of New York are not covered by General Municipal Law §207-a and have a separate pension plan system. However, they are covered by similar statutes so the general principals still apply.

## COVERAGE

Section 207-a provides a guarantee of continued full pay with no charge to leave credits for injured "firefighters" working for a municipality who are injured or became ill because of the performance of duty. The statute also guarantees that the employer is responsible for the cost of treatment. These benefits, which kick in immediately with no waiting period, are significantly better than the benefits all employees receive under Workers' Compensation. In general terms, Workers' Compensation reimburses employees only a percentage of their salary. Currently that is a maximum of $870.61 per week. There is also a minimum waiting period before benefits start. This dramatic difference makes it important to understand the GML 207-a statute, who it applies to and how benefits integrate with other rights and benefits.

The language of Section 207-a is short and relatively simple to read. However, there is much more to it than can be gleaned from reading the statute itself. In order to have a full understanding of the rights and duties under Section 207-a, it is important to understand the rather large body of case law that has developed to interpret the statute. It is also important to recognize that GML 207-a is similar, but not identical, to a companion statute covering police officers, GML 207-c. Because of the similarities in the statutes, the courts have interpreted many of their provisions in identical fashion. The big difference between the two statutes is that a police officer's right to full salary ceases if he/she receives an accidental or performance of duty disability retirement. A firefighter's 207-a salary benefits continue pursuant to GML 207-a (2) after a disability retirement but is reduced by the amount of the retirement benefit. Obviously, in this limited area the court decisions are dissimilar.

## STATUTORY INTERPRETATION

In interpreting the two companion statutes (GML 207-a and GML 207-c), the courts use several basic principles. First, the courts apply cases interpreting the statutes interchangeably even though the two statutes provide slightly different benefits.

Second, both statutes are considered "remedial statutes" passed to cover employees in traditionally dangerous professions. As such, the statutes are liberally construed in favor of the covered employee. White v. County of Cortland, 97 N.Y.2d 336, 339 (2002); Pease v. Colucci, 59 A.D.2d 233, 235 (4th Dept. 1977); Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes, 258 A.D.2d 24, 27 (3rd Dept. 1999); Ross v. Town Bd. of Town of Ramapo, 78 A.D.2d 656, 657 (2nd Dept. 1980).Mashnouk v. Miles, 55 N.Y.2d, 80 (1982); Collins v. City of Yonkers, 207 A.D.2d 830 (2d Dept. 2994); Crawford v. Sheriff's Department Putnam County, 152 A.D.2d 382 (2d Dept. 1989) app. den. 76 N.Y.2d 704 (1990).

## ON-DUTY VERSUS OFF-DUTY INJURY OR ILLNESS

One frequently litigated area is whether an injury or illness is covered. The plain language of Section 207-a provides benefits to firefighters who are disabled "in the performance of" or "as a result of" their job duties. The test under 207-a is whether the injury or illness resulted from the "performance of duty." The test is satisfied if the firefighter can show the firefighter's job duties were a direct cause of the injury or illness. That is true regardless of a pre-existing condition or if the firefighter's job duties exacerbated a pre-existing condition. (Matter of White v. Cortland, 97 NY2d 336 (2002)).

To demonstrate the application of this, we will start with an easy case, that is, the employee who is hurt off the job. Since the statute only covers "performance of duty" injuries, that employee's primary source of benefits is the collective bargaining agreement. Most contracts provide for sick leave and some form of health insurance. The sick leave provisions provide the vehicle to continue receiving wages and the treatment is covered by the health insurance provided under the collective bargaining agreement.

There are outside limits in this instance. The principal one is found in the Civil Service Law, Section 72. CSL §72 applies to absences that are caused by off-duty injuries or illness. It provides that after one year the employer may remove an employee after a hearing provided the

employee is found to be unable to return to work. This statute applies even if the employee has not exhausted his/her sick leave. Employees are frequently surprised about this. The reason is, sick leave provides a right to pay while sick; it does not guarantee a job if you continue to be sick. Section 72 of the Civil Service Law is dealt with in greater detail later.

The harder case is where an injury or illness has more than one cause. The standard used to be that the employee had to show that the job-related accident or illness caused or contributed to the disability to a "substantial degree". Dembowski v. Hanna, 245 A.D.2d 1039 (4th Dept. 1997), lv. for app. den. 91 N.Y.2d 813 (1998); However, in light of the liberal construction of the statute, the Court of Appeals in White v. County of Cortland, 97 N.Y.2d 336, 339 (2002) held that a disabled officer need only prove a direct causal relationship between job duties and the resulting illness or injury. White, 97 N.Y.2d at 340. This means that preexisting non-work-related conditions do not bar recovery under section 207-a as long as the employee demonstrates that the job duties were a direct cause of the disability. White, 97 N.Y.2d at 340.

The White case presents an interesting and example of the breadth of the statute and the real life consequences of the holding. There, medical doctors concluded that White, a correction officer, had suffered a heart attack before he began employment and then, after he began work, suffered a work-related heart attack that disabled him from performing his duties. He then returned to work on a modified-duty basis until he experienced chest pains and shortness of breath. His treating physician recommended that he not continue that work, and his subsequent request for medical leave was granted. At a hearing to determine 207-c eligibility, the evidence showed that White's disability was attributable in part to the 1995 work-related heart attack, and in part to other factors, including preexisting coronary artery disease, stress, a long history of smoking and a family predisposition to heart disease. The hearing officer in White concluded that his disability was less than 25% attributable to his work as a correction officer for the County of Cortland and denied his claim because it had not caused or contributed to his disability to a "substantial degree". The Appellate Courts held that pre-existing non-work related conditions do not bar 207-c

eligibility and granted Officer White 207-c benefits because he established a causal relationship between his on-the-job stress and his disabling heart attack.[2]

Even though the White case involved GML 207-c it has been cited repeatedly in cases interpreting GML 207-a coverage issues.

Other cases similarly held that "when a pre-existing dormant disease is aggravated by an accident, thereby causing a disability that did not previously exist, the accident is responsible for the ensuing disability." Matter of Britt v. DiNapoli, 91 AD3rd 1102, 1103 (3rd Dept. 2012), quoting Matter of Sanchez v. NYS & Local Police and Fire Retirement System, 208 AD2d 1027, 1028 (3rd Dept. 1994); Matter of King v. DiNapoli, 75 AD3rd 793, 795-796 (3rd Dept. 2010).

## SALARY AND BENEFITS

If the firefighter establishes that an injury or illness prevents him/her from performing his/her regular duties, he/she is entitled to continue receiving their regular "salary or wages" without charge to leave credits.

The statutory definition of Salary is fairly straightforward. It is the employee's regular salary or wages, no more and no less. This regular salary, however, excludes overtime, holiday pay, or shift differentials the employee might have earned had they been actively performing their regular unrestricted full duty job. (Benson v. Nassau County, 137 A.D.2d 642, app. den. 72 N.Y.2d 809 (1988) citing Mashnouk v. Miles, 55 N.Y.2d 80 (1982) and Calachon v. City of Binghamton, 55 N.Y.2d 989 (1982)), but includes negotiated increases to base salary that the employee would have received after the injury (Whitted v. City of Newburgh, 65 A.D.3d 1365, 1368 (2nd Dept. 2009) (citing Aitken v. Mount Vernon, 200 A.D.2d 667 (2nd Dept. 1994) and Mashnouk v. Miles, 55 N.Y.2d 80 (1982)). For example, in Carpenter v. City of Troy, 192 A.D.2d 920, 921 (3rd Dept. 1993), a disabled firefighter in the City of Troy sought medical technician salary differential in the

[2] Because the job stress could induce a future fatal heart attack, Officer White was determined to be disabled.

calculation of his past, present and future disability benefits. Carpenter, 192 A.D.2d 920 at 920. The Court rejected his argument because holiday pay and shift differentials are not benefits considered salary or wages. Id. In contrast, in Whitted, a group of retired Newburgh firefighters brought a hybrid CPLR Article 78 and mandamus to compel the city to pay longevity salary increments pursuant to GML 207-a (2). Whitted, 65 A.D. 3d at 1365-66. The Second Department re-affirmed a long-standing case law holding that declaring that the City is obligated to include these increments in payments. Id. at 1367.

However, the Statute creates the floor. A collective bargaining agreement can create a more expansive definition of regular salary or wages.

The collective bargaining agreement definitions are critical in this area. If the CBA **explicitly** includes payment as part of the "regular salary and wages" it will be part of the pay for GML 207-a purposes. If on the other hand the collective bargaining agreement defines a payment as a fringe benefit it will be excluded. What the CBA provides and whether the language is explicit enough has been the subject of many cases litigated in the Courts and before arbitrators. In sum, marshalling the facts makes all the difference in these disputed cases.

Benefits are a little trickier.

The statute requires that the employer pay for all treatment related to the injury or illness. However, the statute is silent on providing, for example, continued health insurance. Since health insurance is not salary but rather a benefit, the statute does not require continued health insurance. The obligation to provide health insurance is typically covered by an employee's collective bargaining agreement. Thus, if "every employee" is entitled to health insurance under the contract, an injured employee, even one on long term GML 207-a leave, continues to receive health insurance as long as the firefighter is on the payroll. The Court of Appeals has specifically held that a firefighter on GML 207-a continues to be an employee. Chalachan v. City of Binghamton, 55 N.Y. 2d. 989, 990 (1982) Similarly, if the collective bargaining agreement provides retiree health insurance, a disabled retiree continues to have the right to health insurance under the same terms as other retirees.

To avoid any doubt the collective bargaining agreement should include a clause that states clearly that health insurance is continued for any employee who is injured or became ill because of the performance of duty. If that is included the employee would be protected even if the Municipality removed the injured firefighter from employment under Civil Service Law Section 71. We discuss this more below.

The statute is likewise silent on the subject of continued leave accruals while the employee is absent such as sick or vacation leave. Many cases have held that the continued accrual of these benefits while on leave are not protected by the statute. For example, vacation and sick leave accrued while on disability leave was held to be not required or protected by either §207-a or §207-c (Phaneuf v. City of Plattsburgh, 84 Misc.2d 70, *affd* 50 A.D.2d 614, *lv dismissed* 38 N.Y.2d 1004), nor are fringe benefits (Matter of Geremski v. Department of Fire, 78 Misc.2d 555), overtime (33 Opns St Comp, 1977, at 71), paid holidays (34 Opns St Comp 1978, at 170), or uniform allowances (1982 Opns St Comp No. 82-352) within the purview of those sections. Thus, the statute does not require that the employee continue to accrue additional leave credits.

The courts and the State Comptroller have taken the position that while the statute does not require additional accruals, it does not forbid them either. Most benefits are covered by the collective bargaining agreement. It is that collective bargaining agreement, not the statute, which is the source of any rights of the injured firefighter to continued accrual of benefits, including leave credits. For example, in Chalachan, disabled firefighters argued that they were entitled to paid vacation time as well as the salary and wages provided by 207-a. Chalachan v. City of Binghamton, 55 N.Y. 2d. 989, 990 (1982). The Court of Appeals held that neither the statutory language, nor the specific collective bargaining agreement at issue, entitled the firefighters to vacation pay. Id. at 990. While the Court noted in Chalachan that disabled and light-duty firefighters continue to receive full wages "strictly [as] a matter of 'statutory right'," the Court also recognized that they retained a "continued status as employees." Id.[3] Most importantly, Chalachan affirmed the

[3] A more recent case, Stewart v. County of Albany, 300 A.D.2d 984 (3rd Dept. 2000), held that despite the employer's obligation to continue payment of 207 benefits, an employer may exercise its rights under Section 71 of the Civil Service Law and terminate an employee who has been absent from work for a year due to a work-related disability. In that instance, it is doubtful that the employee could continue to receive benefits under the CBA.

importance of collective bargaining by holding that the firefighters' entitlement to vacation pay—a matter not covered by the statute—was governed by the language of the collective bargaining agreement, which was silent on the issue disqualifying the firefighters to vacation pay in that case. Id.

Typically, these types of disputes about whether the employee accrues additional leave credits or other contractual benefits while on 207 leave are handled through the contract grievance procedure. In that instance the key event will be the grievance document. Many Municipalities take the position that there is no agreement to arbitrate disputes over what regular salary and wages are under the GML 207-a while simultaneously arguing that the CBA does not explicitly create the right. The Municipality makes this argument in an application to stay arbitration. As with all such proceedings, the key to defeating the application to stay arbitration is to establish the CBA language that creates the right to enhanced salary, wages or benefits for employees on GML 207-a.

Another tool used to protect rights is an improper practice charge. Under familiar standards it is an improper practice charge for an employer to unilaterally change a past practice that provides a wage, benefit or working condition that is a mandatory subject of bargaining or impose a new rule restricting a wage, benefit or practice covering a mandatory subject where one did not previously exist. Wages and benefits, regardless of form are mandatory subjects of bargaining. A change in a practice of including payments in regular salary or wages, or providing health insurance, or continuing the accrual of leave credits while an employee is on GML 207-a is a change that must be negotiated. That is why an improper practice charge can be used to preserve these benefits even though they may not be covered by the Minimum requirements of the statute.

## LIGHT DUTY

GML 207-a provides that during the recovery period, the particular employee may not be well enough to return to his/her "regular" duties, but is well enough to return to provide some services for the employer, albeit not his/her regular services. This concept is known as "light duty". Light duty by definition is different from the regular duties of a firefighter since the employee who is performing

light duty is not able to function completely as a regular, full-duty employee. The determination about light duty must be made by a competent medical authority based on a comparison of the actual duties to be performed in the light duty job and the medical condition of the employee. Although the employer has the right to require an employee to work light duty under certain circumstances, because the employee is still covered by section 207-a, the employee who works light duty cannot be penalized in any way through the loss of any salary, benefits, charges to leave credits or any other privilege and benefit of employment.

Similarly, an employee on light duty should continue to receive all the benefits that he/she would have received had he/she continued to work including raises, enhanced leave credits, holiday pay bonuses, unused sick time bonuses, or any other benefits provided by the collective bargaining agreement.

Since the statute provides that an employee covered by 207 receive salary without charge to leave credits while they are on 207 leave, if the employee returns to light duty, they similarly cannot be charged leave credits to attend required medical treatment during their light duty hours. See, Conomikes v. Libous, 63 A.D.2d 1109 (3d Dept. 1978) and Opinion of the State Comptroller 79-356.

Sometimes there are questions concerning what limitations may be placed on "light duty". In general terms, if a competent medical authority certifies that an employee is well enough to perform light duty, the employer has the right to require it. The medical authority that is making the determination must have knowledge of precisely what the light duty position entails. The reason for this is that frequently a medical authority will permit light duty only if there are restrictions, i.e., time limits or restrictions on lifting, etc. If the medical authorities place restrictions, they must be followed.

On the other end of the spectrum, the duties assigned to the firefighter must, according to the statute, be “consistent with his status as a firefighter”, usually dispatching or working in the Fire Department Office on a specific fire related task.

A member is entitled to a hearing to contest a light duty order only. After a genuine medical dispute has been established, such a dispute can be established by submitting a report by his or her

own personal physician expressing a contrary opinion. Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes, 94 N.Y.2d 686, 692 (2000). Once there is such evidence of a genuine dispute concerning continued total disability, the order to report for light duty may not be enforced, or benefits terminated, pending a resolution of an administrative hearing, which itself is subject to review under CPLR Article 78. Uniform Firefighters of Cohoes, 94 N.Y.2d at 692. Should there be a temporary cessation of benefits prior to obtaining a personal physician's report, any loss of benefits erroneously imposed can be rectified by back pay for benefits lost or restoration of leave credits improperly used. Id.

Frequently, there is a dispute between the employee's own doctor and the doctor hired by the employer; particularly over restrictions. If that occurs, the dispute must be resolved under the hearing procedures we talk about below.

**RETURN TO FULL DUTY**

Sometimes there are disputes about what right the employer has to order an employee back to their regular duties. In simple terms, once an employee is on section 207 leave, the employer may not unilaterally stop the leave until after a hearing, provided there is a genuine dispute. Hodella v. Town of Greenburgh, 73 A.D.2d 967 (2d Dept. 1980); Meehan v. County of Tompkins, 219 A.D.2d 774 (3d Dept. 1995); Hamilton v. City of Schenectady, 210 A.D.2d 843 (3d Dept. 1994). Giorgio v. Bucci, 246 A.D.2d 711 (3d Dept. 1998). That includes cases where there is a dispute about the ability to perform light duty. At the hearing, the issue is whether the employee has recovered sufficiently to either perform light duty or regular duty. Kempkes v. Downey, 53 A.D.3d 547, 548-49 (2nd Dept. 2008); Baker v. Clinton County, 134 A.D.3d 1218, 1220 (3rd Dept. 2015); DeMasi v. Benefico, 34 A.D. 472, 473 (2d. Dep't 2006).

There is an important first step in disputes concerning either a return to full or light duty. A member who disagrees with an order to return to work either light duty or full duty must provide the basis for contesting the decision. In most cases this means the member must provide his/her own doctor's report disputing the department's physician. Without such a medical report, the member has

not created a genuine dispute that is necessary in order to entitle a member to a hearing. See, Matter of Uniform Firefighters v. City of Cohoes, 94 N.Y.2d 686 (2000). Without those records, there is no basis to contest the employer's back to work order, and the order must be obeyed immediately.

In the event that medical documentation is provided contesting a disabled officer's physical capability to return to work, the return to work order is postponed and benefits continue pending a hearing. In this interim period pending a hearing, a municipality cannot deduct accrued leave credits for those officers who provide contrary medical documentation. Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes, 258 A.D.2d 24, 28-29 (3rd Dept. 1999).

## MEDICAL TREATMENT AND RECORDS

The statute requires the employer to pay for all treatments of the injury or illness. But the statute also provides that the injured employee, as a condition of receiving the benefits, must attend any required medical treatment. A refusal to undergo treatments may result in the forfeiture of all benefits. See, GML 207-a (1).

This has been interpreted by the courts to require the employee to undergo invasive treatments such as back surgery. The test is whether the required medical treatment is "reasonable." City of Watertown v. State of N.Y. Public Employment Relations Bd., 95 N.Y.2d 73, 80 (2000) (citing Matter of Schenectady PBA v. PERB, 85 N.Y.2d 480, 486 (1995)). Mandello v. Beekman, 56 N.Y. 513 aff'd on opinion below at 78 A.D.2d 824.In Watertown, the Court held that the City could order a disabled officer to submit to surgery. The statute specifically authorizes a City to appoint "any physician" to examine a sick or injured officer and, further, to provide "medical, surgical or other treatment" as the physician sees fit. Id.

The Court of Appeals also held that a City could require a member to sign a medical confidentiality waiver form concerning the officer's medical condition under the color of its authority to examine an employee. The reasoning is that it would be impossible to conduct an effective medical examination absent a confidentiality waiver. There are limitations. A municipality cannot not require an employee to sign a general confidentiality waiver. It can only insist on such a waiver as necessary to permit the City to determine "the [employee's] medical problem and its relationship to his or her duties." As such, the member must provide releases for records relative to the injury that the member is claiming is disabling him or her, and how it relates to his/her duties but it need not be a full release of a complete medical history. Schenectady PBA, supra, 85 N.Y.2d at 487.

These cases involve police officers under GML 207-c but undoubtedly the principles apply to firefighters covered by GML 207-a.

## DISABILITIES WHERE RECOVERY IS NOT EXPECTED

If an employee cannot fully recover from an on-the-job injury, either the employee or the employer has the right to apply to have the employee placed on disability retirement through the New York State Retirement and Social Security System. See, GML 207-a (2). Because a New York State disability retirement affects the municipality's obligations under GML 207, it is important to have some understanding of the Retirement System's various plans.

In general terms, the issue at the Retirement System involves a series of fact and medical questions. The medical question is straightforward. If there are facts to demonstrate that the illness or injury was caused by the performance of duty or was exacerbated by the performance of has resulted in a permanent loss of an ability to perform the regular duties required of a firefighter, some type of disability is warranted. If the medical report submitted by the employee, the employer and/or

the Retirement System's independent doctors determine that the employee is permanently unable to perform the full duties of a firefighter, he/she is entitled to retire under disability retirement.

There is occasionally a question of what "regular duty" is where an employee is on "light duty" when they apply for disability. If the employee has worked for more than two years on light duty, the Retirement System will consider the duties of the light duty position as the "regular duties" and the courts will uphold that. Perez-Dunham v. McCall, 279 A.D.2d 884 (3rd Dept., January 18, 2001). Id. It will be more difficult for the employee to obtain disability retirement benefits because it will be more difficult for the employee to establish that he or she is unable to perform the tasks of the less rigorous light duty position. The courts have upheld that standard. Perez-Dunham v. McCall, 279 A.D.2d 884 (3rd Dept. 2001).

There are other factors considered as well. In cases where an applicant has been assigned to light duty for at least one year prior to the date of application and who has performed at least 100 hours of paid overtime while on light duty during any 12-month period within the two-year period prior to the application, the job duties of the light duty assignment form the basis for the permanent disability determination. Id.

In cases where the employee has performed light duty for less than two years prior to the date of application for retirement disability and the employee has not performed at least 100 hours of paid overtime in any 12-month period within this two-year period, the basis for the permanent disability determination will be the physical requirements of the employee's full duty assignment. 2 NY ADC 364.3.

It is important for the injured employee to get competent advice about retirement before they work light duty for an extended period because the right to retire on the same terms may be jeopardized by the extended light duty assignment.

The more complicated question involves a selection of which type of disability an employee is entitled to receive.

The hardest type of disability to prove is an accidental disability. Accidental disability for most firefighters working for a city, town or village is typically available under Section 363 of the Retirement and Social Security Law.

The Retirement and Social Security Law Section 363 provides a greatly enhanced retirement benefit (at least 75% of pay) to someone who is "physically or mentally incapacitated for performance of duty as the natural and proximate result of an accident not caused by his own willful negligence. . ." (See R&SSL §363[a] [1])

This section is strictly construed, particularly the "accidental" portion of the statute.

There are a number of cases that hold generally that in order to qualify for an accidental disability, the injury must have occurred as a result of a sudden, fortuitous mischance which is either unexpected or out of the ordinary. There are many cases that hold where, for example, an employee trips over an obstruction, injures their back while performing their normal duties or even comes into contact with noxious fumes as a result of the performance of their normal duties that an employee would not be entitled to an "accidental" disability.

It is far more common to see cases where a firefighter becomes permanently disabled due to an on-the-job injury but the injury was caused in the routine and expected performance of their job. For most firefighters there is a provision for "performance of duty" disability. See R&SSL §363-c Thus, even if the Comptroller denies an accidental disability because an event was foreseeable, the employee receives performance of duty disability. The level of this benefit is not as great as an accidental disability. However, it is significant totaling 50% of final average salary. If the applicant has completed 20 years of service and is eligible for service retirement, the benefit will be calculated as though it was a service retirement benefit. There is no offset for other disability benefits. There are no age or service requirements for a performance of duty disability, but the individual must be permanently disabled and unable to perform the duties of his or her own job and disabled as a direct result of the performance of his/her duties.

The easiest disability retirement benefit to prove is ordinary disability. This requires that an employee worked ten years and is permanently disabled from performing regular duties. The injury or illness need not be work related. The benefits are less than "accidental" or "performance of duty" disability retirement benefits. This is typically a benefit which is only accessed for serious disabling injuries that are unrelated to the performance of duty.

## INTERRELATIONSHIP BETWEEN 207 AND DISABILITY RETIREMENT

### Medical Benefits

If an employee is granted a performance of duty or accidental disability retirement, there is still the question of what remains of the 207-a benefits after retirement.

In order to answer this question, we need to look to the language of section 207-a. Under the statute, the employer shall "be liable for all medical treatment and hospital care necessitated by reason of such injury or illness." This liability to pay for all treatment costs for the disabling injury or illness continues even after an employee receives some type of disability allowance from the New York State Retirement System.

The obligation to provide health insurance for an employee's family and/or the employee's own benefits other than for treatments related to the job-related injury presents a different issue. The obligation to continue benefits--which includes health insurance--is again determined by 207-a. Although Section 207-a specifically states that the employer continues to be responsible to pay for treatment related to the injuries, health insurance for treatments unrelated to the injuries and health insurance for an employee's family is a "benefit" that can be discontinued in certain instances. Whether the obligation the employer has to continue this benefit is determined by the collective bargaining agreement not the GML 207 statute.

If the CBA provides for retiree health insurance the member still gets health insurance as a retiree. Howver, the Civil Service law section 71 allows for the removal of an employee who is absent for more than a year even if the employee is absent because of an injury or illness caused by the performance of duty. That can allow the municipality to cancel health insurance unless the CBA specifically prevents that IE by providing health insurance continues for any member receiving GML 207-a l benefits.

## AFTER RETIREMENT SALARY

The obligation to provide continued salary is where 207-a covering firefighters differs significantly from 207-c covering police and correction officers. A firefighter's 207-a salary continues even if they are granted a disability pension pursuant to GML §207-a (2). Section 207-c covering police and correction officers provides different treatment for salary after retirement. If an employee on 207-c is granted "accidental" or "performance of duty" retirement disability, the obligation to continue their salary under 207-c ceases. GML 207-c covers most police officers working for cities, towns and villages.

A firefighter's 207-a salary benefits continue even if they are granted a disability pension See GML §207-a (2). That means they will continue to receive their full regular salary or wage, including any increases the firefighter union negotiates for the active firefighters. The 207-a benefits (regular salary and wage) stop when the firefighter reaches mandatory retirement age. The mandatory retirement age is set by the particular plan the employee is in. As an aside, if an employee is in a special plan, for example 384-D, they have the right to opt out of the plan and into another one at any time prior to their actual retirement. But they cannot get back in once they opt out. This has a real significance for an employee on 207-a benefits because the mandatory retirement age for the 384-D plan is younger than the mandatory retirement age under other plans. By opting out, the firefighter on 207-a will be prolonging his/her right to full salary.

The amount of any payments from disability retirement acts as a set-off. This means simply that a firefighter who was on 207-a and later receives a job-related disability retirement will receive 100% of his salary until mandatory retirement age.

GML 207-a (4) specifically provides that the obligation to cover treatment costs continues even after mandatory retirement.

The fact that the 207-a benefits continue even after a disability retirement reemphasizes the importance of the 207-a hearing process because the "stakes" are so high for the injured firefighter.

## OUTSIDE EMPLOYMENT

There is an important prerequisite to continued receipt of 207-a benefits. A firefighter forfeits payments and benefits (coverage of treatment costs) if he/she has any outside employment. That is the case regardless of whether the employee is on leave pursuant to GML 207-a, still an active employee working light duty, or retired but receiving GML 207-a (2) benefits. See GML 207-a (6). The same provision allows the municipality to recoup monies and benefits paid out unlawfully, IE the date of the outside employment. This section has been strictly construed against the Firefighter in repeated cases. The consequences of outside employment are so catastrophic it justifies special attention by unions to clearly instruct members of the consequences. It makes no difference if the employment is on the books or off the books. If a payment is made in exchange for work regardless of the circumstances the GML 207-a benefits cease. Passive income from investments is not considered a disqualifying work event.

There is one area that may be treated differently. Under the statute the obligation for continued treatment oftentimes continues even after the firefighter returns to full unrestricted duty but needs follow up care for the injury. In that instance some arbitrators have treated outside employment differently and not serving to end the obligation to provide continued treatment. We are aware of no reported court case on this precise issue.

## TAX TREATMENT

Income derived from payments received pursuant to Workers' Compensation is free from federal taxation under 26 U.S.C.A. §104(a) (1). The state taxing authorities follow the same logic and reasoning of the federal taxing authorities. Under these provisions, the benefits received under either an accidental or ordinary disability payments are tax free.

Section 207-c of the General Municipal Law has been specifically found to be a statute in the nature of a Workers' Compensation statute. 207-a will undoubtedly be treated the same. Because of this, the payments received pursuant to Section 207-a are tax free. IRS Regulation 1.1041-(b) makes it clear that the compensation provided under any statute "in the nature of a workmen's compensation act, that provides compensation to employees for personal injuries or sickness incurred in the course of employment" is exempt from taxation. See also IRS Private Ruling 8746006. In a Private Ruling (8822013) that appears to be discussion Section 207, the IRS held that the statute was in the nature of a Workers' compensation act, and as such, all income earned under the provisions of the statute is excluded from gross income and therefore not subject to state or federal income tax or tax withholding. This means that under both state and federal law there is no obligation to pay taxes on those benefits.

There is recent authority from the IRS that FICA is also not payable and is not to be withheld. While this is probably correct, there has been some question about whether the FICA was payable and was to be withheld until after six (6) months from the date the payments began. This is something on which you should consult with an attorney or tax expert. In addition, your social security "credits" could be impacted depending upon how long you are out.

This changes if the employee works light duty. In that instance, the portion of salary attributed to payments for light duty (i.e., half a day) are taxable with the balance tax free.

However, this particular benefit has been difficult to enforce insofar as getting an employer not to withhold taxes. Employers dealing with the Internal Revenue Service are naturally cautious and generally withhold in the absence of clear direction to the contrary. One case has held that it

is not a violation of the constitutional right not to be deprived of property without due process of law for the employer to withhold taxes from 207-c benefits. Davis v. Casey, 63 F. Supp.2d 361 (S.D.N.Y. 1999).

The technical taxation mechanics of 207-a benefits follow a pattern. If an award of 207-a benefits is automatic, then the wage benefit should be tax free from the first date benefits are paid. However, municipalities are strongly counseled against an automatic award. Instead, a review process for each application is typically undertaken. The more common case is a retroactive award for a lapse in time between when the employee first loses time and when 207-a is awarded. This creates several tax implications. If the award is for time contained within a specific reporting period, a municipality can simply refund the tax and adjust the report and payment to the government. If the first date of lost time and award fall over into a new reporting period, and it is not possible to make a simple adjustment, municipalities can still refund taxes and report the same in the next tax report. As an alternative to adjusting tax reports, the employer can simply choose to report the wage as non-taxable on the employee's W-2. If the individual is paid using accrued leave credits and retroactively awarded 207-a benefits, these benefits are taxed. The municipality can seek re-imbursement of the FICA taxes paid and must simultaneously seek reimbursement for the individual. In the event the individual receives Workers' Compensation only without use of accrued leave credits and 207-a retroactive award rendered, once that retroactive award is made, the municipality has to pay the total amount of wages, less the Workers' Compensation award. When the individual is paid under Worker's Compensation, the municipality is normally reimbursed and correlatively deducts the entire retroactive award from the amount of wages that would have been due for that period of time. The amount paid for the retroactive award would be paid without deduction for taxes.

The question of taxes and bargaining is clearer and less technical. The union may demand to bargain how taxes are reimbursed to the employee, or deducted from an employee when a 207 award is made after the employee begins to lose time. This topic is a mandatory subject of bargaining. See Westchester County Corrections Officers, 33 PERB ¶3025 (2000).

Disability retirement benefits for accidental, ordinary or performance of duty disability are trickier. Title 26 U.S.C. 104(a) (1) provides that amounts received under workmen's compensation acts as compensation for personal injuries or sickness shall not be included in the determination of gross income. This statute is clarified by its implementing regulation, 26 C.F.R. 1.104-1 (b), which states that 104(a)1(1) excludes from gross income amounts which are received under a statute "in the nature of a workmen's compensation act which provides compensation to employees for personal injuries or sickness incurred in the course of employment." 26 C.F.R. 2.204-1(b); see Kane v. United States, 43 F.3d 1446, 1449 (Fed. Cir. 1994). The regulation goes on to state that 104(a) (1) does not apply to a retirement pension determined by reference to the employee's age or length of service "even though the employee's retirement is occasioned by an occupational injury or sickness." That is, statutes providing benefits for any injury or illness that is sustained by an employee, regardless of whether it was incurred in the course of employment or not, are not statutes in the nature of workmen's compensation acts under 104. See Rutter v. C.I.R., 760 F.2d 466, 468 (2nd Cir. 1985); See also Take v. CIR Service, 804 F.2d 553, 557 (9th Cir. 1986). As such, performance of duty and accidental disability retirement income is excludable from gross income while ordinary disability retirement income is not.

**WORKER'S COMPENSATION INTERPLAY WITH 207-a**

Worker's Compensation and 207 benefits can run simultaneously. The following patterns normally arise in Municipalities that have workers compensation coverage for firefighters. However, the workers compensation law does allow a municipality to opt out of workers comp if they provide a comparable alternative benefit. Clearly GML 207-a is a comparable alternative (indeed better) benefit.

In a typical case where workers comp is used the Municipality follows the following pattern. First, the individual uses accrued leave credits to remain on the payroll pending a 207-a determination. Second, the individual receives only Worker's Compensation pay and is therefore not on the municipal payroll. Third, the individual receives 207-a benefits and is subsequently awarded Worker's Compensation.

In the event that Workers' Compensation is awarded prior to a 207-a award, the employee may use accrued leave credits to remain on the payroll. The municipality will request reimbursement from Worker's Compensation. Once an award is rendered in Workers' Compensation, the municipality must reimburse the accrued leave credits in an amount equal to the Worker's Compensation award less the attorney's fees.

In the event an employee receives Workers' Compensation only and is not on the payroll, the municipality is not required to do anything initially. The individual is not earning credit in the NYS Retirement System and is basically absent-without-leave status. In these cases, the municipality usually sends a Civil Service Section 71 letter to the employee.

In the event an employee is receiving 207-a benefits and Workers' Compensation benefits are subsequently awarded, the municipality files a C-250 and requests re-imbursement.

Even in Municipalities that do not use workers compensation in GML 207-a cases it is common for the employee to use sick leave credits until the initial determination is made. If GML 207-a is granted then the sick leave is restored because by statute leave under GML 207 is without charge to leave credits. The particular charge and reimbursement method is an item that a good GML 207-a procedure includes.

## DISPUTE/HEARING PROCEDURES

As in all other relationships with the employer, from time to time a dispute arises. For an on-the-job injury, a dispute could be a question of whether or not the employee was actually injured on the job, whether the employee is actually injured at all, whether the employee has recovered from their injuries, whether the medical expenses are necessary for recovery, whether the employee has improperly refused to return to work light duty or whether the employee has worked outside

employment and is disqualified for receiving GML 207-a. All of these issues are frequently disputed issues between covered employees and their employers across New York State.

When a dispute of this nature arises, it can be resolved in one of three forums. The first possibility is to start an Article 78 proceeding in New York State Supreme Court alleging that an employer has not provided all of the benefits required under the law. The Court will only decide issues under the statute; namely, did the employer provide at least the minimum required benefits. The Court will not interpret a contract if it provides benefits or obligations greater or different than those available under the statute. This is particularly true if there is a question of contract interpretation that gives benefits greater than what the statute provides. One example of this would be where a contract provides continued accruals of vacation benefits while on 207 leave. A court will not enforce this because it exceeds the minimum required by statute. In that instance, you will need to use your contract grievance procedure to obtain relief.

Absent an agreed upon procedure for resolving disputes if the employer makes the decision the Court will be reviewing that decision using an Article 78 standard which gives deference to the employer's decision. The better method is to use some form of arbitration where an impartial makes the decision.

The second possible way is to use the grievance procedure under the parties' collective bargaining agreement.

The third way for settling disputes is with a uniquely created hearing procedure.

Hearing procedures that determine disputes concerning benefits under General Municipal Law §207 are mandatory subjects of bargaining under the Taylor Law. See, Civil Service Law §§200 et seq. As with all other mandatory subjects, it is a violation of the Civil Service Law to unilaterally impose hearing procedures for GML 207 disputes. See, CSEA v. County of Greene, 25 PERB ¶3045 (1992); City of Schenectady v. PERB, 19 PERB ¶7023 (Sup. Ct. Albany Cty, 1986) aff'g 19 PERB 3051 aff'g 19 PERB 4544; Local 589 IAFF v. Newburgh, 17 PERB ¶7506 (Sup. Ct. Orange Cty 1984).

Thus, a union has the right to insist that any GML 207 hearing procedure be negotiated, including the procedures for selecting the ultimate decision maker. See generally, City of Watertown, 95 N.Y.2d 73 (2000). We should note that since Watertown, PERB has held that a demand for de novo (i.e., a fresh or new) review of the initial decision determination by the municipality is not a

mandatory subject of negotiation. Poughkeepsie Firefighters, 33 PERB 3029 (2000). Thus, do not use those words (de novo) in your demand.

## COLLATERAL EFFECT OF THE RETIREMENT SYSTEM'S DECISION AND WORKERS' COMPENSATION DECISIONS

The current state of the law provides that if an employee successfully obtains an accidental or performance of duty disability from the Retirement System, an employer can still make its own independent evaluation using the agreed-upon hearing procedure of entitlement to 207 benefits even though the main issues are still the same, i.e., was the injury related to the performance of duty. See, Cook v. City of Utica, 88 N.Y.2d 833 (1996). The underlying reason for this is that in a typical Retirement System case, the employer is not a party and thus cannot be collaterally estopped from making a different determination.

As we explain above, even though the courts says that the employer has the right to an independent determination, the union has the right to bargain over the procedures for making that independent determination including who makes it, i.e., arbitration.

A determination from the Retirement System is nonetheless relevant and admissible in a separate proceeding if for no other reason because of stare decisis.

A determination from Workers' Compensation is handled the same. Merely because the employee received Workers' Compensation does not automatically mean he/she must receive GML 207-a benefits. Balcerak v. Nassau County, 94 N.Y.2d 253 (1999).

Finally, an injured employee is entitled to obtain benefits from both Workers' Compensation and GML §207 simultaneously. Leone v. Oneida County Sheriff's Department, 80 N.Y.2d 850 (1992). In such a case, there is integration of benefits to prevent any double recovery. See, Workers' Compensation Law §30.

## CIVIL SERVICE LAW REMOVALS

Civil Service Law Section 71 allows a Municipality to remove an employee who is absent for more than one year even if the employee is receiving benefits under GML 207-a or the Workers Compensation Law. Stewart v. County of Albany, 300 A.D.2d 984 (3rd Dept. 2000).
Once the employee is removed they would continue to receive the benefits of GML 207-a but depending on the CBA that may not include employee health insurance, may not include all employee compensation and may not include other fringe benefits. Removal will cutoff the continued accrual of retirement service credits.

The typical motivation for a Municipality pursuing this is to save payroll costs including retirement contributions, free up a position in the table of organization and to motivate employees to pursue retirement options under disability provisions.

In that instance the employee is entitled to a hearing to review any factual issue. For example one fact is whether the employee has been absent for one year. Working light duty for example is not an absence and breaks the period. A second fact is whether the firefighter continues to be disabled. That is a medical question that may be disputed. If not they are entitled to return to duty.

CSL creates the right to a hearing but the Statute does not contain a procedure. As such hearing procedures under CSL 71 are a mandatory subject of bargaining under current PERB precedent.

A Union should demand to bargain over procedures in the instance where an employer seeks to unilaterally create hearing procedures. In our view insistence on a neutral hearing officer, preferably an arbitrator, is essential.

If the Municipality unilaterally acts and removes the employee without using a negotiated hearing procedure the remedy in the PERB IP proceeding can and should include making the affected employee whole by restoring any benefit lost.

Civil Service Law Section 72 allows a municipality to remove an employee who is unable to perform their duties because of a non-work related injury or illness. That is true even if the employee has sick leave accruals. To trigger this the employer must rely on a medical examination that determines the employee is disabled and cannot perform their regular duties.

As with CSL 71, the employee is entitled to a hearing to resolve any disputed issues of fact. Unlike CSL 71 the statute contains a hearing procedure. But there are questions of fact that are typical. The biggest question is whether the employee is disabled. That can be contested with a medical opinion that disputes the findings of the municipalities' medical examiner.

Both CSL 71 & 72 provide that the employee can return to employment once they can establish there fitness to return to full unrestricted duty.

## PRACTICAL CONSIDERATIONS

We are frequently asked by our union clients for advice regarding how to protect their members in processing these cases. Our advice includes several general principles.

### GML PROCEDURE

First, we are convinced that every union should insist on negotiating a 207-a procedure. That procedure should have several components:

(1) The most important component is that the process should end with an impartial decision-maker for disputed cases. We advise that impartial binding arbitration is the best system. Some procedures use doctors to resolve disputes. While that has some logical appeal, the reality is doctors are not lawyers, are not trained to make decisions on disputed facts, and are not accustomed to making decisions in a litigation context with advocates taking contrary positions. Arbitrators are trained to do all that.

(2) The process should require a simple written application form that is automatically filled out whenever there is an on-the-job injury or illness. A copy of the form should be given to everyone involved. If everyone receives a copy of the application, the chances of an application getting "lost" are significantly reduced.

Plus, the records are crucially important if there is a question of a pre-existing injury from an earlier event. The records are also helpful if there is a subsequent Retirement System application. The Retirement System considers a GML application to be notice sufficient to meet the retirement system's statutory notice requirements.

(3) The process should require all parties to exchange all relevant medical information. We believe in the mutual exchange of medical records because in our experience most medical professionals will ultimately agree with one another if they have the same information and are asked the same question.

(4) The process should require that before anyone works light duty, the light duty position is described in detail, in writing, with all restrictions and responsibilities explicitly spelled out. This written explanation should be shared with any medical professional who is asked to examine a firefighter. This minimizes the possibility of a doctor drawing his/her own conclusions about exactly what a light duty position entails. This simple step will eliminate most disputes about light duty.

(5) The process should have timetables that require the employer to make a decision within a set period of time. Few things are more frustrating than an employer that will not make a decision.

(6) The process should cover all disputes, including questions about original eligibility, returns to light duty, returns to full duty, entitlement to particular medical treatment and any other issue.

## PROTECT THE UNION TREASURY

Even after the union has negotiated a procedure, it still needs to limit the amount of money the union spends on what is essentially an individual application for benefits. That is true for both GML 207 and Retirement System Disability Applications. The union should limit its financial commitment. A contested dispute typically involves significant out of pocket expenses. Medical testimony is extremely expensive, particularly if it requires a specialist to personally appear at a hearing. Legal fees can also be extensive, particularly if a hearing is involved. Finally the costs of an arbitrator are significant. At the same time, the benefits to the individual are truly significant.

Benefits this important and valuable should be protected with capable representation using all appropriate resources. The individual has the best motivation for paying for this capable representation.

Because of this, we recommend to our union clients that they negotiate into any procedure that the applicant is the party, not the union. At the same time, we recommend that the union establish a general policy limiting the union's financial commitment to pay the individual claimant's expenses.

## CLEAN UP THE CBA

**Every Union needs to carefully review their CBA with an eye towards protection and elimination of disputes**

- Make sure that the CBA clearly defines what is included in regular salary and wages.
- Negotiate a provision covering the tax withholding for firefighters on GML 207-a.
- Make sure that health insurance is provided to every member who is injured or becomes ill because of the performance of duty. As a practical matter it is politically difficult for a municipality to take the position that the family of a firefighter injured on the job should lose the right to health insurance.
- Clearly define which fringe benefits continue when an employee is on GML 207-a.

## PROTECT AGAINST UNILATERAL ACTS

Many municipalities are aggressively implementing ways to minimize costs for injured firefighters. Almost everything in this area is subject to some obligation to bargain. Diligently insist that the municipality bargain over any change in benefits or salary and any effort to impose hearing processes.

## CONSIDER A REQUIRED SCHEDULE OF PHYSICALS

There are several Firefighter Locals that have negotiated provisions covering required physicals on a regular schedule. The physicals serve several purposes. First the stated purpose of the physical is to qualify firefighters for hazardous material work and to comply with OSHA regulations for use of respirators. But the practical use is much broader. The physicals help protect the safety of all firefighters by identifying illness and injuries early regardless of the cause. Regular physicals improve the health of firefighters generally which has benefits far beyond reducing cost. Physicals also establish a baseline to document which injuries are work related. If there is a negotiated procedure for regular physicals the number of disputes about pre-existing non-work related injuries are minimized. This is precisely why the NFPA includes scheduled Physicals as a "Best Practice" that all Departments should have in place.

The negotiated procedure should include:

- The timing for the physical;
- How the physical is paid for;
- The Standards for the Physical. NFPA standards is one recognized and generally accepted standard;
- A provision that allows the member to use their own Physician to perform the physical using the same agreed upon standards;
- A provision that addresses legitimate medical privacy concerns by limiting access to medical professionals who "need to Know". This addresses legitimate concerns that a physical could reveal a condition that does not impair or affect performance but is nonetheless private;
- Provisions for addressing disputes where the Doctors disagree whether the Firefighter can perform regular duties with or without an accommodation;
- Provisions that address a mechanism that requires firefighters to complete the physical; and
- Addresses what happens when the firefighter fails the physical.