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General Municipal Law §207-c Eligibility: What's Changed Since *Balcerak*

By Richard K. Zuckerman

Section 207-c of the General Municipal Law, enacted in 1961, expressly provides that a police officer shall be entitled to specific benefits provided he or she is "injured in the performance of duties" or "taken sick as a result of the performance of duties."[1] Until the 1999 Court of Appeals decision in *Balcerak v. County of Nassau*,[2] the courts of this State were divided on the issue of whether a determination by the Workers' Compensation Board that an injury or illness arose out of and in the course of employment was dispositive of an employee's entitlement to Section 207-c benefits for that same injury or illness.[3]

In *Balcerak v. County of Nassau*, however, the Court of Appeals held that the issues to be determined in a workers' compensation proceeding were sufficiently dissimilar from those to be determined under General Municipal Law § 207-c to preclude giving so called "collateral estoppel" effect to the workers' compensation determination.[4] Accordingly, the Court held that a finding in favor of workers' compensation benefits has no bearing on whether or not Section 207-c benefits should be granted.[5]

In reaching this conclusion, the Court of Appeals contrasted the intent of the Workers' Compensation Law with that of General Municipal Law § 207-c. The Court explained that the Workers' Compensation Law, "is the State's most general and comprehensive social program, enacted to provide all injured employees with some scheduled compensation and medical expenses, regardless of fault for ordinary and unqualified employment duties."[6]

The Court of Appeals characterized General Municipal Law § 207-c, by contrast, as evincing a legislative intent to provide the benefits set forth therein only in cases where covered employees sustained injuries incurred in the performance of "special work related to the nature of heightened risks and duties."[7] According to the Court of Appeals:

"General Municipal Law § 207-c benefits were meant to fulfill a narrow and important purpose. The goal is to compensate . . . employees for injuries incurred in the performance of special work related to the nature of heightened risks and duties. These functions are keyed to 'the criminal justice process, including investigations, presentencing, criminal supervision, treatment and other preventative corrective services.'"[8]

Post-*Balcerak* Decisions

Following *Balcerak*, a covered employee may be eligible for Section 207-c benefits if his or her injury or illness satisfies the "heightened risk and duties" standard. If it does, then Section 207-c benefits are available. If not, then the covered employee may receive workers' compensation benefits, but not Section 207-c benefits. The practical effect of the *Balcerak* decision has been to eliminate the Workers' Compensation Board as a forum to determine whether an injury or illness is within the purview of Section 207-c and to replace it with a system where those determinations are rendered solely by covered employers, invoking their own procedures.

A. Cases Denying Benefits

As the decisions that follow demonstrate, Section 207-c benefits have been routinely denied where the work-related injury was not sustained due to the "heightened risks and duties" involved in the job. In *Balcerak v. County of Nassau*, on remand from the Court of Appeals, the Appellate Division, Second Department determined that the County had a rational basis for determining that a correction officer's injuries were not sustained in the performance of his duties when he was involved in an automobile accident, in his private car, while on his way home from his post guarding an inmate at a hospital.[9] Relying on the fact that the officer was injured *after* he was relieved of his post, the Court agreed with the supreme court's determination that the officer was not entitled to § 207-c benefits because he was not injured in the performance of his duties.[10]

In *Ertner v. County of Chenango*,[11] the Third Department concluded that Section 207-c benefits were properly denied where a corrections officer sustained injuries when she fell while going downstairs to inspect the first-floor cells of the jail, because the injury did not occur as a result of a "heightened risk peculiar to the performance of the duties of such an officer." The court explained:

"While it would be virtually impossible to enumerate each and every instance in which an employee would be entitled to General Municipal Law § 207-c benefits as opposed to workers' compensation benefits (and such determinations must, of necessity, be made on an ad hoc basis), two rather classic examples come to mind: a police officer injured while pursuing a fleeing felon and a correction officer injured while trying to quell a prison riot. At the opposite end of that spectrum is a case such as this. It can hardly be said that an injury incurred while a correction officer is going up or down stairs at his or her place of employment is one incurred as a result of a heightened risk peculiar to the performance of the duties of such an officer."

In *Wynne v. Town of Ramapo*,[12] the court affirmed the denial of a police officer's application for § 207-c benefits where the officer, while off-duty and on vacation outside of his department's jurisdiction, injured his hand while breaking a window to free a child from a car. Because the officer was off-duty when he sustained his injury, the court determined that Section 207-c benefits were unavailable.

In *Moshier v. City of Little Falls*,[13] the Fourth Department determined that Section 207-c benefits were unavailable because the officer did not sustain a duty-related injury or illness. Unfortunately, the decision does not describe the type of injury or any details as to how it was sustained.

In *Clements v. Panzarella*,[14] § 207-c benefits were denied where, although the police officers were injured in the performance of their duties,[15] the kind of injuries they sustained "were not 'heightened' by the fact that they were police officers involved in 'the criminal justice process'."[16]

In *Stalter v. Scarpato*,[17] three police officers sought review of their employer's denial of Section 207-c benefits. One officer alleged that he injured his foot when he slipped off the curb while investigating an

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automobile accident, while another officer alleged that he injured his knee when he stepped off the rear of a truck while conducting a commercial vehicle inspection. The third officer alleged that he was injured on five separate occasions: (1) a back injury from slipping and falling while evacuating a burning building; (2) a back injury from two separate motor vehicle accidents while driving his patrol car; (3) a foot injury from falling out of a police barricade truck; (4) a re-injury to his foot from tripping over a hose on the garage floor, and (5) a back injury from being was kicked while investigating a domestic disturbance. The court affirmed the denial of Section 207-c benefits for the first two officers because, even though the officers were injured in the line of duty, their injuries were not caused by the "special work related to the nature of heightened risks and duties involved in the criminal justice process." With respect to the third officer, the court determined that his back injuries that were sustained while evacuating a burning building and being kicked during the investigation of a domestic dispute were "conceivably" covered by § 207-c.[18]

In *Pratti v. County of Sullivan*,[19] § 207-c benefits were denied where a police officer tripped on a rug while proceeding to answer the patrol phone, injuring his knee, because his on-the-job injury was not sustained "while performing the inherently dangerous duties of a deputy sheriff, as intended to be included within the ambit of GML Section 207-c".[20]

In *Dobbertin v. Town of Chester*,[21] § 207-c benefits were denied where a police officer was injured when she slipped on a snow-covered driveway while returning to her patrol car following an investigation.

B. Cases Granting Benefits

As the following cases demonstrate, several courts have continued to grant Section 207-c benefits notwithstanding the *Balcerak* decision. These courts generally explain that the relevant language in *Baclerak* was *dicta*, contrary to the broad statutory language of Section 207-c.

In *Theroux v. Reilly*,[22] the court ruled that four of the five corrections officers who had challenged the denial of § 207-c benefits were entitled to those benefits. The injuries at issue were: (1) a shoulder injury when a door was opened while the officer was supervising inmates cleaning a hallway at the jail; (2) an eye injury from accidentally walking into the corner of a suspended television set hanging from the ceiling while conducting an inmate count; (3) shoulder and neck injury caused when, while in the process of making a log entry, the chair in which the officer was sitting broke and collapsed beneath him; (4) lower back injury caused by opening a kitchen door to enable inmates to enter the kitchen, and (5) ankle injury caused when the officer slipped off the edge of a sidewalk in front of the jail while entering the jail to commence a work shift. The court explained that the first four injuries were compensable under § 207-c because they occurred in the performance of the officers' duties. In contrast, the injury that occurred as the officer was entering the jail to *begin* his work shift was not sustained in the performance of his duties, as his shift had not yet begun.

In *Schafer v. Reilly*,[23] two correction officers challenged the denial of § 207-c benefits where one officer sustained a back injury when an operator-controller corridor gate at the jail closed as he was walking through and pinned him against the door jamb, and the other officer suffered a head injury from walking into a suspended television set after being distracted by an inmate and while on his assigned cell block security patrol. The court reasoned that § 207-c benefits were available because these injuries were sustained during the performance of the officers' duties, rejecting the *dicta* in *Balcerak*.

Finally, in *Brasca v. Panzarella*,[24] a police officer tripped over a "PVC" sewer line while on duty when he was walking from his patrol vehicle to a temporary headquarters trailer and sought disability benefits pursuant to § 207-c. The court ruled that § 207-c benefits were available if the officer was injured while in the furtherance of his police duties, explaining that Section 207-c is a remedial statute that "must be liberally construed in favor of those [it is] intended to benefit."[25]

Pending Legislation

In June, 2001, the New York State legislature passed a bill that would effectively overrule the *Balcerak* decision by eliminating the intentional statutory distinction between entitlement to workers' compensation benefits and General Municipal Law Section 207-c benefits.[26] The legislation would also empower the Workers' Compensation Board to make controlling determinations for benefits pursuant to Section 207-c.[27]

The legislation further would amend General Municipal Law Section 207-c to replace "is injured in the performance of his duties or who is taken sick as a result of the performance of his duties" with "suffers an injury of illness arising out of and in the course of his employment, within the meaning of the workers' compensation law," and to change the language that such injury or sickness "was incurred during, or resulted from such performance of duty" to "arose out of and in the course of such employment."[28] It would also add that, "[a]ny award or decision of a workers' compensation board referee which determines whether or not an injury arose out of and in the course of employment, within the meaning of the workers' compensation law, unless reversed or modified on appeal, shall be a final and conclusive determination between the parties to the workers' compensation proceeding as to whether or not the same injury or illness arose out of and in the course of employment within the meaning of this section."[29] In other words, a workers' compensation determination that an injury or illness arose out of employment will be conclusive for requests for benefits pursuant to General Municipal Law § 207-c. The legislation would become effective immediately and retroactively to December 16, 1999. As of this date, the Governor has not acted upon this bill, which has been vigorously opposed by many municipalities and their advocates.

Conclusion

It may be expected that the majority of the courts addressing the issue will continue to apply the *Balcerak* decision as written, at least until it is overruled by pending legislation. Until then, municipalities should be certain to make use of their current window of opportunity to review pending and prior General Municipal § 207-c (and § 207-a determinations) in light of the standards set forth in *Balcerak* and its progeny.

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1. Gen. Mun. Law § 207-c (McKinney 1999).
2. 94 N.Y.2d 253 (1999).
3. Compare, e.g., *O'Hara v. Bigger,* 228 A.D.2d 507 (2d Dep't 1996) (decision of the Workers' Compensation Board did not preclude a hearing on the issue of whether the police officer's injuries occurred in the performance of his duties for General Municipal Law § 207-c purposes) with *De John v. Town of Frankfort,* 209 A.D.2d 938 (4th Dep't 1994) (Town was bound by the unappealed Workers' Compensation Board determination that the police officer's injuries occurred during the performance of his official duties and, accordingly, the police officer was entitled to disability benefits pursuant to § 207-c).
4. 94 N.Y.2d at 261.
5. *Id.*
6. *Id.* at 259.
7. *Id.*
8. *Id.* (citation omitted).
9. 711 N.Y.S.2d 501, 502 (2d Dep't 2000).
10. *Id.*
11. 280 A.D.2d 851 (3d Dep't 2001).
12. 728 N.Y.S.2d 785 (2d Dep't 2001).
13. 281 A.D.2d 913 (4th Dep't 2001).
14. No. 7771/00 (Supreme Court, Nassau County, Sept. 22, 2000) (Winick, J.).
15. One officer injured his back when he slipped and fell while clearing away police lines; the other injured his elbow when he fell while descending a flight of stairs.
16. *Id.*

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Actual Notice In The Garden Of Due Process

By Douglas E. Goodfriend

What constitutes due and sufficient notice when a municipality is considering the imposition of a special assessment in connection with an improvement benefitting limited properties within the municipality?

On November 28, 2000, the New York Court of Appeals issued its decision in *Garden Homes Woodlands Company v. Town of Dover*, 95 N.Y.2d 516 (2000), in which the Court held that notice of a public hearing given solely by publication, as specifically authorized in Section 239 of the Town Law, to consider the imposition of a special assessment for a town improvement district does not satisfy the due process requirements of the Fourteenth Amendment to the United States Constitution. As a result, the special assessment imposed by the Town of Dover in *Garden Homes* was invalidated by the Court. It is worth noting at the outset the factual context of the case: by the time of the 1996 assessment hearings whose notice was the subject of the constitutional challenge, the Town of Dover had already (i) given published notice of the public hearing on the formation of the special improvement district itself and (ii) levied the assessments for the prior, first year of the existence of the special district (having, however, failed to hold the requisite hearing for that year's assessments).

In *Garden Homes*, the defendant town provided notice of the public hearing to consider the imposition of the 1996 special assessment for a special district in compliance with the procedural requirements of Section 239 of the Town Law. That section permits a notice of such a public hearing to be made solely by publication. Garden Homes Woodlands Company ("Garden Homes"), a Connecticut limited partnership described as the owner of substantial vacant land in the special district, alleged that it did not receive notice of the public hearing and, accordingly, had neither an opportunity to appear at the public hearing nor the possibility to object to the special assessment. Upon learning of the special assessment imposed upon its property, Garden Homes commenced an action seeking, among other things, a declaration that the special assessment was invalid and that notice given solely by publication is inadequate under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In agreeing with Garden Homes, the Court determined that the "opportunity to appear and object" at such a hearing is "crucial" and noted that, "The right to appear and object obviously is meaningless unless the property owner has notice that is reasonably calculated to apprise it of the proceedings." 95 N.Y.2d 516 at 521. The Court of Appeals found that the names and addresses of the affected property owners were known to the defendant town, without question, because they appear on the special assessment roll. The Court further found (a) that there was no showing of a compelling persuasive reason, economic or otherwise, why direct notice of the public hearing could not be given to each property owner within the special district, and (b) that the defendant town had an obligation to provide each property owner with actual notice of the public hearing. While the Court did use the terms "direct" and "actual", it did not hold that notice had to be actually received by the property owner for the notice to be effectively given. The Court did hold, however, that a public hearing to consider the imposition of a special assessment for a special district for which notice was given solely by publication does not satisfy the due process requirements of the United States Constitution. Based upon the case law cited in *Garden Homes*, it is not unreasonable to conclude that notice given by first-class mail is sufficient and that, except in circumstances where there exists "compelling or persuasive reasons, economic or otherwise" justifying omission of actual notice, actual notice by first-class mail to each property owner should be given.

Garden Homes is an extension of the federal "*Mennonite* rule" enunciated in *Mennonite Bd. of Missions v. Adams* 462 U.S. 791 (1983), which the Court of Appeals previously applied in New York State in *Matter of McCann v. Scaduto* 71 N.Y.2d 164 (1987). In that case, the Court held that " . . . where the interest of a property owner will be substantially affected by an act of government, and where the owner's name and address are known, due process requires that actual notice be given . . ." 71 N.Y.2d 164 at 176. Indeed, the Supreme Court in *Mennonite* noted that "notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable". 462 U.S. 791 at 800. The Supreme Court cited the New York-originated case of *Covey v. Town of Somers*, 351 U.S. 141 (1956) for the propositions that "a party's ability to take steps to safeguard its interest does not relieve the State of its Constitutional obligation" and that "particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence". 462 U.S. 791 at 799. Various other State Court decisions have also followed this rule. *Matter of ISCA Enters. v. City of New York* 77 N.Y.2d 688 (1991); *Congregation Yetev Lev D'Satmar, Inc. v. County of Sullivan*, 59 N.Y.2d 418 (1983). Previously, such holdings were limited to tax sale and condemnation cases. The extension of the *Mennonite* rule to special assessment cases in New York is a very significant expansion, with potential applicability to a much broader range of circumstances.

In *Garden Homes*, the Town of Dover claimed " . . . that requiring actual notice will open the floodgates and require actual notice in the imposition of other taxes." 95 N.Y.2d 521. However, the Court of Appeals distinguished taxes from special assessments and stated that the United States Supreme Court has "long

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Emergency Preparedness, GIS, Land Use and Public Employee Discipline to Highlight Section Meeting

On January 24, 2002 in conjunction with the 125th Annual Meeting of the New York State Bar Association, the Municipal Law Section will present a full-day continuing legal education program at the Marriott Marquis Hotel in New York City.

Thursday morning's program will begin with a presentation entitled "Regulation and Discipline of Off-Duty Conduct of Public Employees" by Paul J. Siegel, Esq., Jackson Lewis Schnitzler & Krupman, Woodbury. Mr. Siegel will discuss issues relating to the extent to which a municipal employer can limit, sanction or punish off-duty conduct of public employees. The second presentation of the morning entitled "Local Emergency Preparedness – What to do if Disaster Strikes your Community?" will be presented by Linda Kingsley, Esq., Corporation Counsel of the City of Rochester and Mary Louise Meisenzahl, Administrator, Office of Emergency Preparedness, Monroe County. In light of the tragedy of September 11th, the panelists will discuss the powers and resources available to a municipality to protect it citizenry and infrastructure.

Completing the morning program will be a presentation entitled "Geographic Information Systems (GIS) – The World Wide Web and Local Government" by Adam B. Hocherman, Vice President/Engineering, Syncline, Boston, Massachusetts. This presentation will address GIS and its application to various municipal functions, including planning, security and taxation.

The afternoon program will concentrate on land use. First, there will be a panel discussion on the topic of "Managing the Approval Process; Anatomy of a Land Use Application." The panelists will be Henry M. Hocherman, Esq., Shamberg, Marwell, Hocherman, Hollis & Davis P.C., Mount Kisco; Gerald N. Jacobowitz, Esq., Jacobowitz & Gubits, Walden; and Stephen G. Limmer, Esq., Ackerman, Levine, Cullen & Brickman, LLP, Great Neck. The panelists will discuss the land use approval process including the practical, legal and ethical aspects of representing a client before local approval authorities. Concluding the program will be a "Land Use Review" presented by Daniel Spitzer, Esq., Hodgson, Russ, Andrews, Woods & Goodyear, Buffalo, addressing recent cases pertaining to subdivisions, site plans, special permits, variances, nonconforming uses and the State Environmental Quality Review Act.

The Section will also hold its Annual Meeting luncheon with a prominent featured speaker.

Officials instrumental in planning this conference include Municipal Law Section Chair Linda Kingsley, Esq. and Program Co-Chairs Henry M. Hocherman, Esq., and Lester D. Steinman, Esq., White Plains. For reservations and further information, please contact the New York State Bar Association at 518/463-3200.

Due Process

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distinguished" between taxes and special assessments imposed by localities with regard to due process concerns. 95 N.Y.2d 516 at 521. It may be implied that it is the present view of the Court that actual notice of a tax need not be given to each property owner.

The Court in *Garden Homes* was faced with the specific context of a public hearing under Section 239 of the Town Law for public review of the assessment roll for special district assessments. Does the *Mennonite* rule apply to notice of a public hearing held in connection with the establishment of a special district, district extension, improvement area or benefited area? This issue was not before the Court, nor addressed in the decision. However, it is a logical extension of the *Garden Homes* rule that where the property owner's name and address are known, absent "compelling or persuasive reasons, economic or otherwise", due process requires that actual, direct notice of such a hearing be given to each property owner. Further, a municipality should make reasonable efforts to learn the name and address of each such property owner. At the Appellate Division, the Court in the *Garden Homes* case held that "mere adoption of an assessment roll" was not the type of proceeding that "will substantially affect an individual owner's property interest so as to require actual notice prior to adoption". 266 A.D.2d 187. In reversing that decision, the Court of Appeals noted that "the opportunity to appear and object ...is crucial" and that "a failure to challenge would eventually result in a lien imposed upon the land". 95 N.Y.2d 516 at 520. As a standard for determining the need for actual notice by a municipality, any proceedings which could eventually result in a lien on real property (other than taxes of general applicability) would encompass many types of proceedings not requiring actual notice in current law.

The Court in *Garden Homes* described the case as parallel to a previous case affirmed by the Court without opinion, *Smith v. City of New York*, 24 N.Y.2d 782 (1969) *affg. without opn.* 30 A.D.2d 122 (1968). In *Smith*, a special assessment for local street improvements was invalidated for want of actual notice. The decision in *Smith* relied upon an earlier United States Supreme Court decision *in Wisconsin Electric Power Co. v. City of Milwaukee*, 352 U.S. 948 (1956), in which notice by publication of proposed special assessments was at issue. On remand to the Wisconsin Supreme Court, that Court held that publication notice was insufficient for purposes of satisfying due process requirements. 275 Wisc. 121 (1957). In other states, comparable decisions have been rendered. *City of Houston v. Fore*, 412 S.W.2d 35 (Tex.) (1967); *Ridenour v. County of Bay*, 366 Mich. 225 (1962); *Fritz v. Board of Trustees of Town of Clermont*, 253 Ind. 202 (1969); *Meadowbrook Manor v. City of St. Louis Park, Inc.*, 258 Minn. 266 (1960).

The trend thus appears to be in the direction of actual notice for all hearing proceedings in which property interests will be "substantially affected by an act of government" and the property owners' names and addresses are reasonably knowable. Is this constitutional threshold crossed by the possibility of a resultant property lien of any magnitude or is some reasonable standard of financial impact by act or cumulatively to be required? Is prior notice of potential financial liability at earlier stages in a governmental action sufficient? For example, does a special district formation with actual hearing notice provide potentially affected property owners with due notice of their future annual obligations in this regard (particularly in districts with an ad valorem basis of assessment) or is specific annual notice of prospective financial impact necessary? The Court in *Garden Homes*, in discussing the defendant town's claim that Garden Homes should have known of its assessment obligation due to the prior year's levy, noted that the plaintiff "had no way of knowing" whether the new levy would be "substantially different," (95 N.Y. 2d 516 at 521) and "should not be compelled to rely on an earlier experience." *ibid.* However, the extent of financial impact was not the sole criteria considered by the Court. The Court particularly focused on the right of the plaintiff to object to the "methodology employed" in the imposition of the assessment, suggesting that it is not simply, or perhaps even predominately, the financial effect on a property owner's interest, but also the potentially flawed cause that demands constitutionally protected citizen scrutiny. Indeed, the Court's comments on "methodology" speak to a deeper constitutional element in the case: the right of the affected property owner to object to the formulas by which such property is assessed, for it is in the details, vigilantly reviewed annually, that the devil, and equal protection, lies.

In future proceedings for the establishment of special districts, district extensions, improvement or benefitted areas, and in any other similar instance where special assessments will ultimately be levied, perhaps including improvements pursuant to Section 202-b of the Town Law, Section 268 of the County Law and Section 22-2200 of the Village Law, it would seem prudent that notice of the public hearing in connection with such proceedings be made by, among other methods such as publication and posting, mailing such notice to each affected property owner.

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Mr. Goodfriend is of counsel to the firm of Orrick, Herrington & Sutcliffe LLP where he concentrates his practice on public finance . The contributions of Tom Myers, Esq. to this article are great appreciated.

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17. No. 11203/00, N.Y.L.J., Dec. 1, 2000, at 32 (Supreme Court, Nassau County, Dec. 1, 2000) (Winick, J.), *appeal pending*.
18. *Id.*
19. No. 1067/99 (Supreme Court, Sullivan County, July 9, 1999) (Kane, J.).
20. *Id.*
21. No. 5735/00 (Supreme Court, Orange County, December 22, 2000) (Slobod, J.), *appeal pending*.
22. No. 014251/00, 2001 WL 459132 (Supreme Court, Nassau County Feb. 7, 2001) (DeMaro, J.), *appeal pending*.
23. No. 20497/00 (Supreme Court, Nassau County, April 19, 2001) (Davis, J.).
24. No. 13265/00 (Supreme Court, Nassau County, Sept. 25, 2000) (De Maro, J.), *appeal pending*.
25. *Id.*
26. *See* New York State Senate Bill No. S. 5279, 2001-02 Regular Senate Session (N.Y. May 9, 2001); New York State Assembly Bill No. A. 8587, 2001-02 Regular Assembly Session (N.Y. April 26, 2001). It should be noted that this legislation would not affect General Municipal Law § 207-a, which applies to firefighters.
27. *Id.*
28. *Id.*
29. *Id.*