The Gap in the Pension Law into which Sick '9/11' Firefighters and other City Rescue Workers are Falling: a Legal Limbo with Devastating and Dangerous Ramifications.

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Published in Nassau Lawyer, the Nassau Bar Association's Monthly Journal, November 2006.

Our firm has been representing New York City employees in disability pension cases, as well as in civil rights litigation, for nearly 30 years. Obtaining a disability pension for a 9/11 related illness is becoming increasingly difficult. Firefighters, cops, EMT's and many other civil servants disabled as a result of their 9/11 efforts are being denied pensions falling into a financially devastating legal limbo. This is a direct result of the structure of the pension law, the limited power of the State Courts, the controlling authority which affords Pension Funds' overly broad discretion in disability pension cases, and the Court of Appeals' unwillingness to re-examine the breadth of said discretion. Many of these individuals have been forced to commence Federal Litigation in an effort to secure their disability benefits. Within the FDNY and other City agencies, workers are now hiding illnesses to avoid falling into the gap. As a result firefighters and other civil servants with lung problems and other ailments are remaining on full duty despite being sick for fear of entering the same limbo which has financially crippled their brethren.

An ever-growing number of New York City Firefighters and other New York City employees are becoming sick and disabled by health problems relating to their rescue, recovery, and clean-up efforts at Ground Zero and other 9/11 sites. However, these individuals are regularly being denied disability pensions and are falling into a legal limbo caused by a gap in the pension law resulting from the New York City Administrative Code and Court of Appeals decisions like Borenstein v. New York City Employees' Retirement System, 88 N.Y.2d 756 (1996), which is causing these sick heroes extraordinary financial harm.

For the purpose of this article, the plight of FDNY members will be focused upon as the Department's structure and the prominent role of firefighters in 9/11 efforts gives the clearest illustration of this problem. However, workers from other City agencies such as the New York City Police Department ("NYPD") and Correction and Sanitation Departments, are encountering similar legal pitfalls in relation to 9/11 illnesses. Despite recent legislation amending the disability pension laws of all City agencies whose members took part in the World Trade Center disaster relief and recovery efforts, hundreds, perhaps thousands, continue to be denied disability pensions to which they are seemingly entitled, and it appears the numbers will only grow. Most alarming, is that these men and women are being denied disability pensions despite their personal, City

and Agency doctors determining they are too sick to perform full duty. Yet, with the current statutory structure, they become stuck in a legal limbo which causes them grave financial harm, in addition to their deteriorating health.

The Medical Board Committee, a highly experienced three doctor panel from the City's Bureau of Health Services ("BHS"), determines FDNY members' fitness for duty. Since 9/11, these BHS doctors have removed hundreds of firefighters from full duty finding them to be unfit, as a result of various 9/11 related ailments, most often, lung problems. These individuals deemed to be "permanently-partially disabled" are removed from full duty and re-assigned to "permanent-light" duty ("LSS"). Members must then be assigned to a light duty post, which is almost always a '9-5', indoor, sedentary job.

Firefighters on LSS do receive a full base salary, but they generally lose the ability to perform overtime, lose their 24-hour tours which provides them with multiple days off thereby eliminating their ability to maintain a second job; which is common in the Fire Department. Therefore, once deemed to be unfit for full duty by BHS doctors, an FDNY member suffers severe economic loss as firefighters by and large, survive financially on overtime and "off-duty employment." This economic reality is the main reason why 'LSS' FDNY members apply for disability pensions, which are 75% of their final salary, state tax free. Disability retirement from the Fire Department allows for the performance of other employment that is not comparable to full fire duty. There are earnings caps, but in many cases, disabled FDNY members have been forced to apply for Social Security disability after leaving the job, as their conditions prevent any type of gainful employment in the private sector where there are stringent sick time policies. It must be pointed out however, that firefighters do not want to the leave the job. Almost all will tell you, even knowing the effect it has had on their health, it is "the best job in the world."

When an FDNY member applies for an Accident Disability Retirement pension ("ADR", also know as a "line-of-duty" pension), or if such an application is put in on the members' behalf by the Department, (which often occurs when he or she remains on light duty for over 1 year), the 1-B Pension Fund Medical Board, comprised of three doctors with varying areas of expertise selected by the Pension Fund Board of Trustees, evaluate the applications for approval. Pension Fund Medical Board doctors are not required to be an "expert" in the area of disability upon which any application is based. The standard for an ADR pension is whether a member is "physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service." However, the fact that an applicant can never return to full duty because they have been assigned to permanent light duty by the City doctors, who concur with applicants' private doctors, deem them permanently partially disabled, has no effect on the Pension Fund Medical Board which has been increasingly denying firefighters with disabling lung conditions their disability pensions.

Membership in the Pension Fund and entitlement to benefits accruing there under are not mere gratuity, but instead reflect substantial contributions by the member to the fund during their careers. As stated by the Court of Appeals in O'Marah v. Levitt, 35 NY2d 593, 596 (1974): "[T]he purpose of a statute providing for accident disability retirement is to assure the availability of such benefits to an employee who is permanently incapacitated as a result of injuries received in the line of duty. The statute should be so construed as to carry out the desired objective as fairly and reasonably as possible." While it is supposedly a legal mandate that decisions on disability pension applications be objective determinations that include a humane concern for the welfare and interests of the applicant, an FDNY member found permanently unfit for full duty because of a condition such as 9/11 related pulmonary disorder, can still be denied a disability pension because of the current gap in the law.

The New York City Administrative Code, Section 13, Subchapter 2, controls the FDNY Pension structure. Under the Code, it is solely within the province of the Pension Fund Medical Board to determine if a member is entitled to a disability pension and the burden of proof rests with the applicant. FDNY members who have been placed on permanent light duty by City doctors and deemed disabled for full duty by numerous outside doctors, are nevertheless found fit for full duty in the opinion of the Pension Fund Medical Board doctors, and denied a disability pension. In most FDNY pulmonary cases, applicants are being denied ADR despite presenting to the Medical Board positive results on an array of lung tests, showing them to have varying types and degrees of asthma, reactive airway disease, and reduced lung capacity. (It should be noted that these workers were healthy and passed all Department physicals before coming on the job, and almost certainly would not have been accepted for the job had they possessed any type of asthmatic condition). It is these same test results which the BHS doctors base their determination to remove a member from full duty.

The only, actual result of the decision to deny an application by the pension Fund Medical Board, is that an applicant is not awarded a pension. If an individual that dies while on full duty as a result of their pulmonary condition, or goes into respiratory distress at a fire scene and compromises a rescue effort resulting in a civilian casualty, the City is at a great risk for liability. Yet, the Pension doctors are legally permitted to disregard the BHS doctors' opinions.

In most instances , the only legal recourse a denied pension applicants has, while on light duty, other than to re-apply which is a lengthy process, is to challenge the denial in State Court through an Article 78 Petition seeking a determination that the denial by the Pension Fund was "arbitrary and capricious." (It should be noted, under New York City Civil Service Law §71, members can be terminated for "Medical Incompetence" if not on full duty for more than a year.) However, the controlling

case law in disability pension cases is Borenstein v. New York City Employees' Retirement System, 88 N.Y.2d 756 (1996). In Borenstein, the Court of Appeals created an extremely broad standard. If a Pension Fund Medical Board can show it based its denial merely on "some credible evidence," then the denial is legally sufficient. Moreover, in Matter of Meyer v. Board of Trustees of the New York City Fire Dep't, 90 N.Y.2d 139 (1997), the Court of Appeals extended the unilateral broad power of Pension Medical Boards by establishing that the Board's own "expert opinion," whether it has conducted a physical exam of the applicant or not, constitutes "credible evidence." Hence, an Article 78 challenge attempting to show that a denial is not based on "some credible evidence," when the Board's review itself is essentially considered "some credible evidence," is monumentally difficult.

However, the State Court in an Article 78 proceeding of this type only has the power to remand an application to the Pension Fund for further review. Often despite strongly worded decisions by State Court Judges condemning the actions of the FDNY 1-B Pension Fund as arbitrary and capricious and pointing out specific deficiencies in the Pension Fund's evaluation and denial, the Pension Fund Medical Board will continue to deny the applications. Moreover, the Appellate Division, Second Department has been reluctant to deviate from or offer any challenge to the broad Borenstein standard, and the Court of Appeals has denied all attempts to review this standard.

However, feeling it was the only real option to secure these individuals, the pensions to which they are entitled, the firm recently filed 25 Federal lawsuits under the Americans With Disabilities Act. It is our contention that these are disabled individuals being denied a benefit to which they are entitled. Moreover, we feel there are civil, constitutional, and statutory rights violations, as well as employment and disability discrimination, and equal protection violations herein, and see the Federal Court as the only venue where justice can be obtained, based on the State law gaps. The Federal suits allege numerous causes of action, including the 1-B Fund changing its definition of a disability to avoid awarding too many ADR pensions, including purposely switching to a lesser pulmonary test to determine disability, and relying on less qualified doctors when gauging disability and the requirements of full fire duty.